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REPORT OF THE PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

Addendum

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PART ONE

DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

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PREAMBLE[1]

The States Parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court;

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;[2]

Have agreed as follows:

---

[1] In this connection, there was a proposal contained in document A/AC.249/1998/DP.6.

[2] Delegations have expressed their opposition to the wording of the third paragraph of the preamble and have asked that this paragraph be made consistent with article 1 of the Statute so as to read as follows:

"Emphasizing further that such a court shall be complementary to national criminal jurisdictions;"

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

There is established an International Criminal Court ("the Court"), which shall have the power to bring persons to justice for the most serious crimes of international concern, and which shall be complementary to national criminal jurisdictions. Its jurisdiction and functioning shall be governed by the provisions of this Statute.

N.B. Attention should be paid to using the term "Court" throughout the Statute in a consistent manner.

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations by an agreement to be approved by the States Parties to this Statute and concluded by the President on behalf of the Court.

Article 3

Seat of the Court

1. The seat of the Court shall be established at ... in ... ("the host State").

2. The President, with the approval of the Assembly of States Parties, may conclude an agreement with the host State, establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State.

Article 4

Status and legal capacity

1. The Court is a permanent institution open to States Parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) the crime of aggression;

(c) war crimes;

(d) crimes against humanity;

(e) ...

N.B. Once a decision is made as to which crimes should be included in the draft Statute, the paragraphs of this introductory article should be adjusted and the subsequent provisions placed in separate articles and numbered accordingly.

Crime of genocide

For the purpose of the present Statute, the crime of genocide means any of the following acts committed with intent[1] to destroy, in whole or in part, a national, ethnical, racial or religious group,[2] as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm[3] to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

---

[1] The reference to "intent to destroy, in whole or in part ... a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.

[2] The Preparatory Committee took note of the suggestion to examine the possibility of addressing "social and political" groups in the context of crimes against humanity.

N.B. The need for this footnote should be reviewed in the light of the discussions that have taken place in respect of crimes against humanity.

[3] The reference to "mental harm" is understood to mean more than the minor or temporary impairment of mental faculties.

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group;

[The following acts shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.][4]

[[5]Crime of aggression[6]

Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in article 10.

Option 1

[For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:

(a) planning,

(b) preparing,

(c) ordering,

---

[4] The Working Group will return to the question of the placement of article III of the Genocide Convention once the Working Group on general principles of criminal law has considered this issue in the context of its work.

N.B. See also article 23 (Individual criminal responsibility).

[5] This square bracket closes at the end of paragraph 2.

[6] The proposal reflects the view held by a large number of delegations that the crime of aggression should be included in the Statute.

The Preparatory Committee considered this crime without prejudice to a final decision on its inclusion in the Statute.

(d) initiating, or

(e) carrying out

[an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

Option 2

1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

[2. [Acts constituting [aggression] [armed attack] include the following:][7]

[Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;

---

[7] Paragraph 2 of the text reflects the view held by some delegations that the definition should include an enumeration of the acts constituting aggression.

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]]

Option 3

[1. For the purpose of the present Statute [and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State], the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing the political or military action of a State:

(a) initiating, or

(b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.]

2. Where an attack under paragraph 1 has been committed, the

(a) planning,

(b) preparing, or

(c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.]

War crimes[8]

For the purpose of the present Statute, war crimes means:

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

---

[8] Views were expressed that certain provisions should be placed within square brackets. The relative placement of the various options does not indicate in any way the measure of support for such options. Some options commanded very limited support.

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering, or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement;

(h) taking of hostages.

B. Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts:

(a)

Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(a bis)

Option 1

intentionally directing attacks against civilian objects which are not military objectives;

Option 2

No paragraph (a bis).

(b)

Option 1

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to

civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity;[9]

Option 2

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated;[10]

Option 3

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;[11]

Option 4

No paragraph (b).

(b bis)

Option 1

intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

---

[9] It has been accepted that it will be necessary to insert a provision, probably in the general principles section, which sets out the elements of knowledge and intent which must be found to have existed for an accused to be convicted of a war crime. For example: "in order to conclude that an accused had the knowledge and criminal intention required to be convicted of a crime, the Court must first determine that, taking account of the relevant circumstances of, and information available to, the accused at the time, the accused had the requisite knowledge and intent to commit the crime."

N.B. With respect to this footnote see, however, articles 29 (Mens rea (mental elements)) and 30 (Mistake of fact or of law), which deal with similar issues.

[10] Ibid.

[11] Ibid.

Option 2

No paragraph (b bis).

(c)

Option 1

attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;

Option 2

making non-defended localities and demilitarized zones the objects of attack;

(d) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(e) making improper use of flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(f)

Option 1

the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

Option 2

the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 3

(i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(ii) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 4

No paragraph (f).

(g)

Option 1

intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(h) subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(i) killing or wounding treacherously individuals belonging to the hostile nation or army;

(j) declaring that no quarter will be given;

(k) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(l) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(m) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(n) pillaging a town or place, even when taken by assault;

(o)

Option 1

employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;

Option 2

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(vi) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

Option 3

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate;

Option 4

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate:

or

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, such as but not limited to:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(vi) nuclear weapons,

(vii) anti-personnel mines,

(viii) blinding laser weapons,

(ix) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

(p)

Option 1

committing outrages upon personal dignity, in particular humiliating and degrading treatment;

Option 2

committing outrages upon personal dignity, in particular humiliating and degrading treatment as well as practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination;

(p bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(q) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(s) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t)

Option 1

forcing children under the age of fifteen years to take direct part in hostilities.

Option 2

recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities.[12]

Option 3

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 4

No paragraph (t).

* * *

OPTION I

Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal

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[12] This option seeks to incorporate the essential principles contained under accepted international law while using language suitable for individual criminal responsibility as opposed to State responsibility.

The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase of the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.

disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) taking of hostages;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(a)

Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(b) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(c)

Option 1

intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(d) pillaging a town or place, even when taken by assault;

(e) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(e bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(f)

Option 1

forcing children under the age of fifteen years to take direct part in hostilities;

Option 2

recruiting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

Option 3

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 4

No paragraph (f).

(g) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) killing or wounding treacherously a combatant adversary;

(i) declaring that no quarter will be given;

(j) subjecting persons who are in the power of another Party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of

the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(k) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(l)

Option 1

No provision on prohibited weapons.

Option 2

A reference to arms, in the light of the discussions on paragraph B(o).

OPTION II

Insert the following provisions in section D:

- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;

- intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

- slavery and the slave trade in all their forms;

OPTION III

Delete the opening clause of sections C and D.

OPTION IV

Delete section D.

OPTION V

Delete sections C and D.

* * *

Elsewhere in the Statute:

Option 1

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.[13]

Option 2

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.[2]

Option 3

No provision on threshold.

* * *

Article Y

(relating to the part of the Statute dealing with the definition of crimes)

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

N.B.

- Article Y could constitute a separate article or could be placed in article 5 (Crimes within the jurisdiction of the Court).

- Article 21, paragraph 3 (Nullum crimen sine lege) and article 20 (Applicable law) deal with related issues.

Crimes against humanity

1. For the purpose of the present Statute, a crime against humanity means any of the following acts when committed

[as part of a widespread [and] [or] systematic commission of such acts against any population]:

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[13] The view was expressed that the substance and placement of this proposal should be considered.

[as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]:

N.B. In case the second alternative is retained, its relationship with paragraph 1 (h) should be considered.

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) [detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms];[14]

(f) torture;

(g) rape or other sexual abuse [of comparable gravity,] or enforced prostitution;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds[15] [and in connection with other crimes within the jurisdiction of the Court];

(i) enforced disappearance of persons;[16]

(j) other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health.[17]

[2. For the purpose of paragraph 1:

(a) extermination includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population;

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[14] It was suggested that this subparagraph does not include freedom of speech and that it includes the unilateral blockade of populations.

[15] This also includes, for example, social, economic and mental or physical disability grounds.

[16] It was suggested that some more time was needed to reflect upon the inclusion of this subparagraph.

[17] It was suggested that the inclusion of this paragraph should be subject to further clarification. It was also suggested that the list of acts should include institutionalized discrimination.

(b) "deportation or forcible transfer of population" means the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [resident] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification];

(c) ["torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person [in the custody or physical control of the accused] [deprived of liberty]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions [in conformity with international law]]

["torture" as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984];

(d) persecution means the wilful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds];

(e) ["enforced disappearance of persons" means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, thereby placing them outside the protection of the law]

*[18]

[Crimes of terrorism

For the purposes of the present Statute, crimes of terrorism means:

(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;

(2) An offence under the following Conventions:

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[18] The Preparatory Committee considered the following three crimes (crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances) without prejudice to a final decision on their inclusion in the Statute. The Preparatory Committee also discussed these three crimes only in a general manner and did not have time to examine them as thoroughly as the other crimes.

(a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;

(b) Convention for the Suppression of Unlawful Seizure of Aircraft;

(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(d) International Convention against the Taking of Hostages;

(e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

(f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;

(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.]

[Crimes against United Nations and associated personnel

1. For the purpose of the present Statute, "crimes against United Nations and associated personnel" means any of the following acts [when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate]:

(a) murder, kidnapping or other attack upon the person or liberty of any such personnel;

(b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.]

[[19]Crimes involving the illicit traffic in narcotic drugs and psychotropic substances

For the purposes of the present Statute, crimes involving the illicit traffic in narcotic drugs and psychotropic substances means any of the following

[19] This square bracket ends at the end of the article.

acts committed on a large scale and in a transboundary context:

(a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in subparagraph (i) above;

(iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II of the annex to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) The organization, management or financing of any of the offences enumerated in subparagraphs (i), (ii), (iii) or (iv) above;

(b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his or her actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.

N.B. The Court's jurisdiction with regard to these crimes will only apply to States parties to the Statute which have accepted the jurisdiction of the Court with respect to those crimes. Refer to article 9, option 1, paragraph 2, or option 2, paragraph 1.]

Article 6

[Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]

1. The Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 5, paragraph [(a) to (e), or any combination thereof] [and in accordance with the provisions of this Statute] if:

[(a) the [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 10] [acting under Chapter VII of the Charter];]

(b) a complaint is lodged by a State Party [two State Parties] [or a non-State Party] in accordance with article 11;

[(c) the matter is brought by the Prosecutor, in accordance with article 12.]

[2. [In the case of paragraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9 and] [if national jurisdiction is either not available or ineffective] [in accordance with article 15] or if [an interested State] [interested States] [those States] have deferred the matter to the Court.]

[[20]Article 7

Preconditions to the exercise of jurisdiction

Opening clause of paragraph 1

Option 1[21]

[In the case of article 6, paragraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted [the exercise of] the jurisdiction of the Court over the crimes referred to in [article 5, paragraphs (a) to (e), or any combination thereof] in accordance with article 9:

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[20] This square bracket ends at the end of article 7.

[21] Options are not put in square brackets because they are alternatives supported by only some delegations. Some other delegations suggested the deletion of one or more of the options or have suggested other changes within the options.

Option 2

[In the case of article 6, paragraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted the exercise of the jurisdiction of the Court with respect to a case in question which is the subject of a complaint lodged by a State:

[(a) [the State that has custody of the suspect with respect to the crime ("custodial State")] [by the State on whose territory the person is resident at the time the complaint is lodged] [in accordance with international law];]

[(b) the State on the territory of which the act [or omission] in question occurred [or if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;]

[(c) if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purposes of prosecution, [unless the request is rejected];]

[(d) the State of which the victim is a national;]

[(e) the State of which the [accused] [suspect] of the crime is a national;]

[2. If a State whose acceptance is required for the exercise of the jurisdiction by the Court rejects such acceptance, that State shall so inform the Court [giving reasons thereof].][22]

[3. Notwithstanding paragraph 1, if a State whose acceptance is required has not indicated whether it gives such acceptance or not within a period of (...), then the Court [may] [may not] exercise its jurisdiction accordingly.][23]

[4. When a State that is not a Party to the Statute has an interest in the acts mentioned in the complaint, this State may, by an express declaration deposited with the Registrar of the Court, agree that the Court shall exercise jurisdiction in respect of the acts specified in the declaration.]]

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[22] This paragraph is relevant only to option 2 of the opening clause to paragraph 1.

[23] Ibid.

[[24]Article 8[25]

Temporal jurisdiction

1. The Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute.

[When a State becomes a Party to this Statute after its entry into force, the Court cannot be seized in respect of crimes committed by its nationals or on its territory or against its nationals, unless those crimes have been committed after the deposit by that State of its instrument of ratification or accession.]

[2. The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]]

N.B. There is an interrelationship between this article and article 22 (Non-retroactivity).

[[26]Article 9

Acceptance of the jurisdiction of the Court

Option 1[27]

1. A State that becomes a Party to this Statute thereby accepts the [inherent] jurisdiction of the Court with respect to the crimes referred to in article 5, paragraphs [(a) to (d), or any combination thereof].

2. With regard to the crimes referred to in article 5 other than those mentioned in paragraph 1, a State Party to this Statute may declare:

(a) at the time it expresses its consent to be bound by the Statute; or

(b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

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[24] This square bracket ends at the end of article 8.

[25] The issues raised in this article deserve further reflection as to its place in the Statute.

[26] The square bracket ends at the end of paragraph 5 of this article.

[27] Options 1 and 2 are not mutually exclusive and could be combined in such a way that option 1 may be used in respect of some crimes and option 2 in respect of other crimes.

3. If under article 7 the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9 of the Statute.]

Option 2

1. A State Party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to [such of] the crimes referred to in [article 5, paragraphs (a) to (e), or any combination thereof] as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to [particular conduct or to conduct] [one or more of the crimes referred to in article 5, paragraphs (a) to (e),] committed during a particular period of time.[28]

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six month's notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.[29]

4. If under article 7 the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9 of the Statute.]

[5. A declaration referred to in paragraphs 1 to 3 may not contain other limitations than those mentioned in paragraphs 1 to 3.]]

Further option

Acceptance of the jurisdiction of the Court:

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5, [paragraphs (a) to (d)].

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[28] This paragraph may also apply to option 1.

[29] Ibid.

[2. A State that is not a Party to this Statute may, by declaration lodged with the Registrar, accept the obligation to cooperate with the Court with respect to the prosecution of any crime referred to in article 5. The accepting State shall then cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.]

[[30]Article 10

[[Action by] [Role of] The Security Council] [Relationship between the Security Council and the International Criminal Court]

1. [Notwithstanding article 6, [7] [and [9], the Court has jurisdiction in accordance with this Statute with respect to crimes [referred to] [specified] in article 5 [as a consequence of the referral of] [on the basis of a [formal] decision to refer] a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council [acting under Chapter VII of the Charter of the United Nations] [in accordance with the terms of such referral].

2. [Notification of] [A letter from the President of the Security Council conveying] the Security Council decision to the Prosecutor of the Court shall be accompanied by all supporting material available to the Council.]

3. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5 appear to have been committed.]

4.

Option 1

[A complaint of or directly related to [an act] [a crime] of aggression [referred to in article 5] may [not] be brought [under this Statute] unless the Security Council has [first] [determined] [formally decided] that the act of a State that is the subject of the complaint, [is] [is not] an act of aggression [in accordance with Chapter VII of the Charter of the United Nations].

Option 2

[The determination [under Article 39 of the Charter of the United Nations] of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression.]

5. [A referral of a matter to the Court or] [A determination] [A formal decision] by the Security Council [under paragraph 4 above] shall not be

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[30] This square bracket ends at the end of option 2 of paragraph 7.

interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned.

6. [A complaint of or directly related to an act of aggression brought under this Statute and the findings of the Court in such cases is without prejudice to the powers of the Security Council under Chapter VII of the Charter.]

[[31]7. Option 1

No prosecution may be commenced under this Statute arising from a [dispute or] situation [[pertaining to international peace and security or an act of aggression] which [is being dealt with] [actively] by the Security Council] [as a threat to or breach of the peace or an act of aggression] [under Chapter VII of the Charter], [where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations], [unless the Security Council otherwise decides] [without the prior consent of the Security Council].

Option 2

1. [Subject to paragraph 4 of this article], no prosecution may be commenced [or proceeded with] under this Statute [for a period of twelve months] where the Security Council has [decided that there is a threat to or breach of the peace or an act of aggression and], acting under Chapter VII of the Charter of the United Nations, [given a direction] [taken a [formal and specific] decision] to that effect.

2. [Notification] [A formal decision of the Security Council to the effect] that the Security Council is continuing to act may be renewed at intervals of twelve months [by a subsequent decision].]

3. [Should no action be taken by the Security Council in accordance with Chapter VII of the Charter of the United Nations within a reasonable time, the Court may exercise its jurisdiction in respect of the situation referred to in paragraph 1 of this article.]]]

Article 11[32]

Complaint by State

1.

Option 1

[[A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948] [A State

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[31] This square bracket ends at the end of paragraph 3 of option 2.

[32] This article was moved here from Part 5.

Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime]] may lodge a complaint [referring a [matter] [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to] [with] the Prosecutor [alleging that [a crime of genocide] [such a crime] [a crime under article 5, paragraphs [(a) to (d), or any combination thereof]] appears to have been committed] [and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]]

Option 2

[A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime] [that has a direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 5, paragraphs [(a) to (d), or any combination thereof]] appears to have been committed:

(a) a State on the territory of which the act [or omission] in question occurred;

(b) a State of the custody;

(c) a State of the nationality of a suspect;

(d) a State of the nationality of victims.]

[2. A State Party, which, for a crime under article 5, paragraph (e), has accepted the jurisdiction of the Court pursuant to article 9 and is a party to the treaty concerned may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.][33]

[3. As far as possible, a complaint shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.][34]

[4. The Prosecutor shall notify the Security Council of all complaints lodged under article 11.]

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[33] This provision is without any prejudice to the position of delegations with regard to "treaty crimes".

[34] Further discussion on the content of a complaint may be necessary in the context of matters dealing with procedures.

[Article 12[35]

Prosecutor

The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 5, paragraphs (a) to (d), from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]][36]

N.B. The terms "sufficient basis" used in this article (if retained) and "reasonable basis" in article 54, paragraph 1, should be harmonized.

[Article 13

Information submitted to the Prosecutor

1. Upon receipt of information relating to the commission of a crime under article 5, submitted by victims, associations on their behalf, regional or international organizations or any other reliable source, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, non-governmental organizations, victims or their representatives or other sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules.

2. If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, having regard to article 15, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction and admissibility of the case pursuant to article 17.

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[35] This article was moved here from Part 5.

[36] The procedure to be followed by the Prosecutor in relation to this article may be discussed further.

The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence pertaining to the same situation.

3. If, after the preliminary examination referred to in paragraph 1, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.]

Further option for articles 6, 7, 10 and 11[37]

[Article 6

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 11;

[(b) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 12]; or

(b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council [acting under Chapter VII of the Charter of the United Nations]].

[Article 7

Acceptance of jurisdiction

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. Where a situation has been referred to the Court by a State Party [or where the Prosecutor has initiated an investigation], the Court may exercise its jurisdiction with respect to a crime referred to in article 5 provided that [one of] the following States [are Parties] [is Party] to the Statute or [has] [have] accepted the jurisdiction of the Court with respect to the crime in question in accordance with paragraph 3 below:

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[37] It was mentioned that although the approach taken in this option merited consideration, strong reservations were expressed with regard to the references to the Security Council; the view was also expressed that the Court should not exercise jurisdiction unless States Parties gave their express consent.

[(a) the State that has custody of the suspect with respect to the crime ("custodial State")] [the State of the nationality of the suspect];

(b) the State on the territory of which the act or omission in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.

3. If the acceptance of a State that is not a Party to this Statute is required under paragraph 2 above, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.]

[Article 10

Role of the Security Council

[1. The Court may not exercise its jurisdiction with respect to a crime of aggression unless the Security Council has first determined under Chapter VII of the Charter of the United Nations that the State concerned has committed an act of aggression. A determination by the Security Council shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of any person concerned.]

2. No investigation or prosecution may be commenced or proceeded with under this Statute [for a period of twelve months] after the Security Council[, acting under Chapter VII of the Charter of the United Nations,] has requested the Court to that effect; that request may be renewed by the Council under the same conditions.]

[Article 11

Referral of a situation by a State

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.

3. The Prosecutor shall notify the Security Council of all situations referred under this article.]

Article 14

Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

N.B. This article seems to be unnecessary in view of a similar text in paragraph 1 of article 17 (Challenges to the jurisdiction of the Court or the admissibility of a case) and could therefore be deleted.

Article 15

Issues of admissibility[38]

The following draft text represents the results of informal consultations on article 15 and is intended to facilitate the work towards the elaboration of the Statute of the Court. The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article.

1. Having regard to paragraph 3 of the preamble,[39] the Court shall determine that a case is inadmissible where:

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

*[40]

(b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the

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[38] The present text of article 15 is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned.

[39] Suggestions were made that the principle of complementarity should be further clarified either in this article or elsewhere in the Statute.

[40] The proposal on extradition or international cooperation is not included in the text, subject to the determination of whether the relevant State would be able to present arguments in the procedure on admissibility.

N.B. In the context of this footnote, see also article 17, paragraph 2 (Challenges to the jurisdiction of the Court or the admissibility of a case).

decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) the person concerned has already been tried for conduct which is the subject of the complaint,[41] and a trial by the Court is not permitted under paragraph 2 of article 18;[42]

**[43]

(d) the case is not of sufficient gravity to justify further action by the Court.[44]

2. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

(a) the proceedings[45] were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 5;

(b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

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[41] If the Security Council can refer situations to the Court or the Prosecutor can initiate investigations, then the appropriate wording may be considered.

[42] It was noted that article 15 should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 18, as currently worded, did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 18 to determine whether the reference to article 18 was sufficient or whether additional language was needed in article 15 to address these situations.

[43] Some delegations preferred the inclusion of the following subparagraph: "the accused is not liable under article 92 (Rule of speciality) to be prosecuted before or punished by the Court".

N.B. In the light of the text of article 92 (Rule of speciality), consideration should be given as to whether this footnote is still necessary.

[44] Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted.

[45] The term "proceedings" covers both investigations and prosecutions.

(c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

[Article 16

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by public announcement and by notification to all States Parties.

2. Within [ ] days of the public announcement of such referral, a State may inform the Court that it is investigating its nationals or others within its jurisdiction with respect to criminal acts that allegedly were committed in the context of the matter referred to the Court and that may constitute offences described in article 5. At the request of that State, the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor determines that there has been a total or partial collapse or unavailability of the State's national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions. Before the Prosecutor may commence investigation of such persons, the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor's determination. The Prosecutor's deferral to the State's investigation shall be open for review by the Prosecutor [six months] [one year] after the date of deferral.

3. A preliminary ruling of the Pre-Trial Chamber confirming the Prosecutor's determination may be appealed to the Appeals Chamber by the State concerned. If the preliminary ruling is appealed by the State, [two thirds] [all] of the judges of the Appeals Chamber must confirm that ruling before the Prosecutor may commence the investigation and seek indictments.

4. When the Prosecutor has deferred an investigation pursuant to section 2, the Prosecutor may request that the State concerned report periodically on the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

5. That a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge admissibility of a case under article 17[46] [or to withhold its consent to the exercise of jurisdiction under article 7].]

Article 17

Challenges to the jurisdiction of the Court or the admissibility of a case

1. At all stages of the proceedings, the Court (a) shall satisfy itself as to its jurisdiction over a case and (b) may, on its own motion, determine the admissibility of the case pursuant to article 15.[47]

2. Challenges to the admissibility of the case, pursuant to article 15, or challenges to the jurisdiction of the Court may be made by:

(a) an accused [or a suspect];[48]

(b) [A State] [[An interested] State Party] which has jurisdiction over the crime on the ground that it is investigating or prosecuting the case or has investigated or prosecuted[49]

[a State [State Party] of nationality of a person referred to in paragraph 2 (a) [on the ground that it is investigating or prosecuting the case or has investigated or prosecuted]]

[and a State [State Party] which has received a request for cooperation];

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.

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[46] Article 17, paragraph 5, should be revised to require a vote by two thirds of the judges of the Appeals Chamber to decide that a case is admissible.

[47] In the light of the wording to be adopted for article 17, several draft provisions of the Statute may have to be re-examined including article 54, paragraph 6, and article 58, paragraph 2 (b).

[48] The term "suspect" includes a person who is the subject to an investigation. Another option is to limit the right to challenge to a suspect arrested on the basis of a pre-indictment arrest warrant.

[49] The final wording of this subparagraph will depend on the content of article 15.

In proceedings with respect to jurisdiction or admissibility, those having submitted the case pursuant to article 6,[50] [those non-States parties which have jurisdiction over the crimes][51] as well as victims, may also submit observations to the Court.

3.[52] The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2.

The challenge must take place prior to or at the commencement of the trial.

In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court as provided in the preceding subparagraph, may only be based on article 15, paragraph 1 (c).[53]

4. A State referred to in paragraph 2 (b) of the present article shall make a challenge at the earliest opportunity.[54]

5. Prior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court, shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber.[55]

[6. If the Court has decided that a case is inadmissible pursuant to article 15, the Prosecutor, may, at any time, submit a request for a review of

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[50] The final wording (States, Security Council, Prosecutor) will depend on the content of article 6.

[51] This provision would apply to the option where only States parties can challenge the jurisdiction of the Court or the admissibility of a case.

[52] It was suggested that if several States have jurisdiction over a case and one of those States has already challenged the jurisdiction of the Court, the remaining States should not bring additional challenges except on different grounds.

[53] The final wording of this subparagraph will depend on the content of article 15.

[54] The question arises as to what consequences, if any, should flow from the failure of a State to make a timely challenge.

[55] The question concerning the suspension of the trial proceeding in case of appeal should be addressed in the Rules of Procedure and Evidence.

the decision, on the grounds that conditions required under article 15 to render the case inadmissible no longer exist or that new facts arose.]

Article 18

Ne bis in idem

1. Except as provided in this Statute,[56] no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried before another court for a crime[57] referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3.[58] No person who has been tried by another court for conduct also proscribed under article 5 shall be tried by the Court unless the proceedings in the other court:

...[59]

(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) otherwise were not conducted independently or impartially and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

...[60]

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[56] The phrase "Except as provided in this Statute" should be reviewed in the light of the final text of article 83.

[57] It was noted that further consideration might be necessary on whether this paragraph should apply to conduct constituting a crime or a similar notion.

[58] Further consideration might be necessary in the light of the final text of article 15.

[59] It was noted that further consideration might be necessary on whether there should be additional exceptions to the principle of ne bis in idem, such as failure to take account of the grave nature of the crime, at either the trial or the sentencing stage.

[60] The principle in article 77 that the Court may deduct time previously served in connection with conduct underlying the crime should be reviewed, as it was pointed out that the Court should, in principle, be obliged to deduct any such time.

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

[Article 19[61]

Without prejudice to article 18, a person who has been tried by another court for conduct also proscribed under article 5 may be tried by the Court if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty.]

Article 20

Applicable law

1. The Court shall apply:

(a) in the first place, this Statute and its Rules of Procedure and Evidence;

(b) if necessary, applicable treaties and the principles and rules of general international law [, including the established principles of the law of armed conflict];

(c)[62]

Option 1

failing that, general principles of law derived by the Court from national laws of legal systems of the world [, where those national laws are not inconsistent with this Statute and with international law and internationally recognized norms and standards].

Option 2

failing that, and only insofar as it is consistent with the objectives and purpose of this Statute:

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[61] It was noted that further consideration of this article, in particular its content and placement, is needed.

[62] There was broad support for option 1. Some delegations, however, favoured the approach taken in option 2.

(i) the national law of the State where the crime was committed or, if the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;

(ii) if the laws of the State or States mentioned in subparagraph (i) do not exist, the national law of the State of nationality of the accused or, if the accused does not have a nationality, the national law of the State of his or her permanent residence; or

(iii) if the laws of the States mentioned in subparagraphs (i) and (ii) do not exist, the national law of the State which has custody of the accused.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, which include the prohibition on any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria.[63]

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[63] It was generally agreed that consistency with internationally recognized human rights would require that interpretation by the Court be consistent with the principle of nullum crimen sine lege. A view was also expressed that this should be explicitly stated in this article or be made clearer in article 21. For example, article 21, paragraph 2, could be reformulated as follows:

"The provisions of article 5 shall be strictly construed and shall not be extended by analogy to, or be interpreted to proscribe, conduct not clearly criminal under it."

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 21

Nullum crimen sine lege

1. Provided that this Statute is applicable in accordance with article 6, 7, 8, 9 or 10 a person shall not be criminally responsible under this Statute:

(a) in the case of a prosecution with respect to a crime referred to in article 5, paragraphs [(a) to (d)], unless the conduct in question constitutes a crime that is defined in this Statute;

(b) in the case of a prosecution with respect to a crime referred to in article [5, paragraph (e)], unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

[2. Conduct shall not be construed as criminal and sanctions shall not be applied under this Statute by a process of analogy.]

3. Paragraph 1 shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

Article 22

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article 21, a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.][1]

Article 23

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

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[1] This provision raises issues relating to non-retroactivity, amendment of the Statute and penalties. Accordingly, further consideration of this issue is required.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.][2]

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.][3]

N.B. In the context of paragraphs 5 and 6, see also articles 76 (Penalties applicable to legal persons) and 99 (Enforcement of fines and forfeiture measures).

7. [Subject to the provisions of articles 25, 28 and 29,] a person is criminally responsible and liable for punishment for a crime defined [in article 5] [in this Statute] if that person:

(a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 25;]

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[2] This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

[3] There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;[4]

(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];][5] [6]

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)[7] [with the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.[8]

N.B. This article should be re-examined as to the references to the mental element in view of article 29 (Mens rea (mental elements)).

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[4] It was pointed out that the commentary to the ILC Draft Code of Crimes (A/51/10, p. 24, para. (12)) implicitly also includes aiding, abetting or assisting ex post facto. This presumption was questioned in the context of the ICC. If aiding, etc., ex post facto were deemed necessary to be criminalized, an explicit provision would be needed.

[5] In addition to the two types of conduct described in paragraph (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

[6] The inclusion of this subparagraph gave rise to divergent views.

[7] Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

[8] A view was expressed that it would be preferable that issues connected with attempt be taken up in a separate article rather than in the framework of individual responsibility. In that view, the article on individual responsibility should only refer to the way in which the person takes part in the commission of a crime, regardless of whether it deals with a completed crime or an attempted crime.

Article 24

Irrelevance of official position

1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.[9]

Article 25

Responsibility of [commanders] [superiors][10] for acts of [forces under their command] [subordinates][11]

[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible] [A [commander] [superior] is not relieved of responsibility][12] for crimes under this Statute committed by [forces] [subordinates] under his or her command [or authority] and effective control as a result of the [commander's] [superior's] failure to exercise properly this control where:

(a) the [commander] [superior] either knew, or [owing to the widespread commission of the offences] [owing to the circumstances at the time] should have known, that the [forces] [subordinates] were committing or intending to commit such crimes; and

(b) the [commander] [superior] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof].

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[9] Further discussion of paragraph 2 would be required in connection with international judicial cooperation.

[10] Most delegations were in favour of extending the principle of command responsibility to any superior.

[11] One delegation held the view that this principle should be dealt with in connection with the definitions of the crimes.

[12] The alternatives highlight the question whether command responsibility is a form of criminal responsibility in addition to others or whether it is a principle that commanders are not immune for the acts of their subordinates.

Article 26

Age of responsibility

N.B. In the context of this article, see also article 75, paragraph (a) (Applicable penalties).

Proposal 1

1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute [, unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].

[2. A person who is between the age of [sixteen] and [twenty-one] at the time of the [alleged] commission of a crime shall be evaluated [by the Court] as to his or her maturity to determine whether the person is responsible under this Statute.]

Proposal 2

[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial and sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in the Statute.][13]

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[13] Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors.

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 of proposal 1 in respect of both of the age groups mentioned.

A question was raised as to what would be the criteria of the evaluation process, and should this be left for the Court to develop in supplementary rules or by jurisprudence?

It was observed that, in its article 1, the Convention on the Rights of the Child defines as a child every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole.

Article 27

Statute of limitations

Proposal 1

[1. The period of limitations shall be completed upon the lapse of xx years for the offence of ..., and yy years for the offence of ...

2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State that has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned.]

Proposal 2

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court.]

Proposal 3

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court; but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, owing to the lapse of time, a person would be denied a fair trial.]

Proposal 4

[Crimes not subject to limitation

The crimes referred to in article 5, paragraphs (a), (b) and (d), shall not be subject to limitation.

Crimes subject to limitation

1. Proceedings before the Court in respect of the crimes referred to in article 5, paragraph (c), shall be subject to a period of limitation of 10 full years from the date on which the crime was committed, provided that during this period no prosecution has been brought.

2. If a prosecution has been initiated during this period, either before the Court or in a State competent to bring a prosecution under its internal law, the proceedings before the Court shall not be subject to limitation until 10 full years have elapsed from the date of the most recent prosecution.]

Proposal 5

[1. The statute of limitations as established hereunder shall extinguish the criminal prosecution and the punishment.

2. The statute of limitations will be [ ] years and shall commence to run as follows:

(a) in case of instantaneous crime, from the moment of its perpetration;

(b) in case of attempt, from the moment the last act of execution was performed or the due conduct was omitted;

(c) in case of permanent crime, from the moment of the cessation of the criminal conduct.

3. The statute of limitations may be interrupted by the actions taken in the investigation of the crime and its perpetrators. If those actions were stopped, the statute of limitations will run again as of the day the last act of investigation was carried out.

4. The statute of limitations for definitive sanctions will run as of the moment the condemned person escaped and will be interrupted with its detention.]

N.B. The proposals under this article have not been consolidated.

[Article 28

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) the omission is specified in the definition of the crime under this Statute; or

(b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a

pre-existing [legal] obligation under this Statute[14] to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].[15]

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.][16]][17]

Article 29

Mens rea (mental elements)

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent and knowledge.

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

(a) in relation to conduct, that person means to engage in the act [or omission];

(b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means to be aware that a circumstance exists or a consequence will occur.

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[14] Some delegations questioned whether the source of this obligation is wider than the Statute.

[15] Some delegations had concerns about including this clause which referred to the creation of a risk. Other delegations thought that, in the context of the offences of the Statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient.

[16] Some delegations thought that a provision on causation was not necessary.

[17] These brackets reflect the view expressed that, although much progress has been made on the definition of omission, the question whether omission should be inserted in the Statute depends upon the final drafting of this article.

[4.[18] [19] For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

(a) the person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) the person is aware that the risk is highly unreasonable to take;

[and]

[(c) the person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]]

N.B. The inclusion of the notion of recklessness should be re-examined in view of the definition of crimes.

Article 30[20]

Mistake of fact[21] or of law

Option 1

Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment.

Option 2

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime [charged provided that said mistake is not inconsistent with the nature of the crime or its elements] [, and provided that the circumstances he reasonably believed to be true would have been lawful].

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[18] Further discussion is needed on this paragraph.

[19] A view was expressed to the effect that there was no reason for rejecting the concept of commission of an offence also through negligence, in which case the offender shall be liable only when so prescribed by the Statute.

[20] There were widely divergent views on this article.

[21] Some delegations were of the view that mistake of fact was not necessary because it was covered by mens rea.

2. Mistake of law may not be cited as a ground for excluding criminal responsibility [, except where specifically provided for in this Statute].[22]

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct:[23]

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

[(b) the person is in a state of [involuntary] intoxication [by alcohol, drugs or other means] that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; [provided, however, that if the person has voluntarily become intoxicated [[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]],[24] the person shall remain criminally responsible;]

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[22] Some delegations felt that paragraph 2 of option 2 still left some ambiguity, and an alternative approach could read as follows:

> "Mistake of law as to whether a particular type of conduct is a crime under this Statute, or whether a crime is within the jurisdiction of the Court, is not a ground for excluding criminal responsibility. However, a [reasonable] mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime."

[23] The link between the opening clause of paragraph 1 and paragraph 2 may need to be further considered.

[24] There are two approaches to the question of voluntary intoxication: If it is decided that voluntary intoxication should in no case be an acceptable ground for excluding criminal responsibility, the text within brackets "[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]" would have to be deleted. In that case, however, provision should be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime committed due to their intoxication. If this text were to be retained, the ground for excluding criminal responsibility would apply in all cases of voluntary intoxication except for those in which the person became intoxicated in order to commit the crime in an intoxicated condition (actio libera in causa). This would probably lead to a great number of war crimes and crimes against humanity going unpunished.

(c) the person [, provided that he or she did not put himself or herself voluntarily into a position causing the situation to which that ground for excluding criminal responsibility would apply,] acts [swiftly and] reasonably [, or in the reasonable belief that force is necessary,] to defend himself or herself or another person [or property] against an [imminent ...[25] use of force] [immediate ...[26] threat of force] [impending ...[27] use of force] and [[unlawful] [and] [unjustified]] use of force in a [not excessive] manner[.] [[not disproportionate] [reasonably proportionate] to the degree of danger to the person [or liberty] [or property] protected];

(d) [the person reasonably believes that][28] there is a threat of [imminent] death or serious bodily harm against that person or another person [or against his or her liberty] [or property or property interests] and the person acts reasonably to avoid this threat, provided that the person's action[29] [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided;[30] [however, if the person has [knowingly] [recklessly] exposed him or herself to a situation which was likely to lead to the threat, the person shall remain responsible];

(e) [the person reasonably believes that there are][31] [there are] [the person necessarily acts in response to] circumstances beyond that person's control which constitute a [threat of [imminent] death or serious bodily harm] [danger] to that person or another person [or property or property rights][32] and the person acts reasonably to avoid the [threat] [danger], [provided that the person intended to prevent a greater harm [and did not intend to cause] [and did not cause] death][33] and provided that there exists no other way to avoid such threat].

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[25] Dots inserted so as not to repeat "[[unlawful] [and] [unjustified]]" in all three alternatives.

[26] Ibid.

[27] Ibid.

[28] This should be considered together with article 30.

[29] A proposal was made to replace the rest of the first sentence by "is under the circumstances not reasonably more excessive than the threat or perceived threat".

[30] A proposal was made to replace "provided that the person's action [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided" with "employing means which are not disproportionate to the risk faced".

[31] This should be considered together with article 30.

[32] It was suggested that a mere reference to the law of necessity would suffice in place of the first part of the sentence.

[33] This applies more to a military situation.

2. The Court may[34] determine the applicability of the grounds for exclusion of criminal responsibility [listed in paragraph 1] [permitted by this Statute] [to the case before it].[35]

Article 32

Superior orders and prescription of law

1. The fact that a person's conduct was pursuant to an order of a Government or of a superior [whether military or civilian] shall [not] relieve the person of criminal responsibility [[if] [unless] the order [was known to be unlawful or] appeared to be manifestly unlawful].[36]

[2. The perpetrator of or an accomplice in a crime of genocide [or a crime against humanity] [or a ...] shall not be exempted from criminal responsibility on the sole ground that the person's conduct was pursuant to an order of a Government or a superior, or pursuant to national legislation or regulations.][37] [38]

[Article 33][39]

[Possible grounds for excluding criminal responsibility specifically referring to war crimes]

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[34] The issue of the extent to which the facts underlying these grounds, for excluding criminal responsibility, if not sufficient to exclude criminal responsibility, should instead be considered in mitigation of punishment will be dealt with in Part 7.

[35] The link between the opening clause of paragraph 1 and paragraph 2 may need to be reconsidered.

[36] An unlawful or manifestly unlawful order must be understood as an order in conflict with the rules of international law applicable in armed conflict.

[37] This subparagraph should be considered together with article 31, paragraph 2.

[38] For the question of mitigating circumstances, see Part 7.

[39] It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes.

Article 34

Other grounds for excluding criminal responsibility

1. At trial the Court may consider a ground for excluding criminal responsibility not specifically enumerated in this part if the ground:

(a) is recognized [in general principles of criminal law common to civilized nations] [in the State with the most significant contacts to the crime] with respect to the type of conduct charged; and

(b) deals with a principle clearly beyond the scope of the grounds for excluding criminal responsibility enumerated in this part and is not otherwise inconsistent with those or any other provisions of the Statute.

2. The procedure for asserting such a ground for excluding criminal responsibility shall be set forth in the Rules of Procedure and Evidence.[40]

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[40] This article needs to be further considered together with article 31, paragraph 2, and article 20.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 35

Organs of the Court

The Court consists of the following organs:

(a) a Presidency;

(b) an Appeals Chamber, Trial Chambers and [a Pre-Trial Chamber] [Pre-Trial Chambers];

(c) the Office of the Prosecutor;

(d) a Registry.

Article 36

Judges serving on a full-time basis

The judges composing the Presidency[1] shall serve on a full-time basis as soon as they are elected. [The judges composing [the] [a] Pre-Trial Chamber shall serve on a full-time basis [once the Court[2] is seized of a matter] [when required in the view of the President].] [On the recommendation of the Presidency, the States Parties] [The Presidency] may [by a two-thirds majority] decide that the workload of the Court requires that the judges [composing any of the other Chambers] should serve on a full-time [or part-time] basis.

Article 37

Qualification and election of judges

1. Subject to the provisions in paragraph 2, there shall be [...] judges of the Court.

[There shall be no fewer than [...][3] judges from each geographical group as established by the General Assembly of the United Nations.]

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[1] The view was expressed that reference should be made here to the "President" rather than the "Presidency".

[2] Delegations agreed that this reference to "the Court" means the whole Court, as set out in article 35.

[3] The number is dependent on the total number of judges.

2. (a) The President, acting on behalf of the Court, [as well as any State Party] may propose an increase [or decrease] in the number of judges, indicating the reasons why this is considered necessary and appropriate. Any such proposal shall be submitted to the Registrar, who shall promptly circulate it to all States Parties;[4]

(b) Any such proposal shall then be considered at a meeting of States Parties to be convened in accordance with article [...].[5] The adoption and entry into force of any such proposal shall require a [two-thirds] majority of States Parties [present and voting at that meeting];[6]

(c) The election of additional judges shall then take place at the next session of the Assembly of States Parties. [Any decrease in the number of judges shall however only be given effect as and when the terms of office of the relevant number of existing judges end.][7]

3. The judges of the Court shall:

(a) be persons of high moral character and impartiality [who possess all the qualifications required in their respective States for appointment to the highest judicial offices]; [and]

(b) have:

(i) [at least ten years'] [extensive] criminal [law] [trial] experience [as a judge, prosecutor or defending counsel]; [or] [and, where possible]

(ii) recognized competence in international law [in particular international criminal law, international humanitarian law and human rights law] [; and

(c) possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51].

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[4] The relationship between this provision and the provisions on amendments to the Statute needs to be borne in mind.

[5] The article dealing with the convening of regular and extraordinary meetings of the Assembly of States Parties.

[6] Consideration could be given to the quorum required for extraordinary meetings of the Assembly of States Parties in the appropriate article dealing with the convening of such meetings.

[7] This provision is conditional upon the acceptance of the words "or decrease" in paragraph 2 (a).

4. Option 1

Each [State Party] [national group appointed for the purpose by a State [Party]] may nominate for election not more than three persons [, all of whom must be nationals of different [States] [States Parties],] [who possess the qualification(s) referred to in paragraph 3] [and who are willing to serve as may be required on the Court].

[The [State Party] [national group] shall indicate which of the qualifications referred to in paragraph 3 (b) the candidate possesses.]

Option 2

(a) When an election is required, the Nominating Committee shall develop a list of candidates, equal in number to the number of positions to be filled.

(b) The Nominating Committee shall be composed by the Assembly of States Parties.

(c) Once the Nominating Committee is established, the Registrar shall provide the Committee, upon request, with any necessary facilities and administrative and staff support.

5. The judges of the Court shall be elected by secret ballot by [an absolute] [a two-thirds] majority vote of the [Assembly of the [States Parties present and voting] [General Assembly of the United Nations] [and the Security Council] from a list of persons nominated in accordance with paragraph 4.[8]

[[Two thirds] [One half] of the States Parties shall constitute a quorum at the meeting of the Assembly of States Parties for this purpose.]

[In the event that a sufficient number of judges is not elected, the Nominating Committee shall provide a further list of candidates and there shall be another election.][9]

6. No two judges may be nationals of the same State.

[7. [A sufficient number of the judges to constitute the Pre-Trial Chamber and Trial Chambers] [[Two thirds] [A majority] of the judges] shall be elected from among candidates having criminal [trial] [law] experience.]

8. [States Parties] [The General Assembly of the United Nations][10] shall, in the election of the judges, [bear in mind] [take into account the need for]:

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[8] Matters relating to the mode by which votes would be cast and the compilation and announcement of results could be dealt with by the Rules of Procedure and Evidence.

[9] This provision is linked to option 2 in paragraph 4.

[10] These options reflect the different entities which may elect the judges.

(a) the representation of the principal legal systems of the world;

[(b) the representation of the main forms of civilization;]

(c) equitable geographical distribution;

[(d) gender balance;]

[(e) the need, within the membership of the Court, for expertise on issues related to sexual and gender violence, violence against children and other similar matters].

[9. A judge may not be over the age of 65 at the time of election.]

10. Judges shall hold office for a term of [five] [nine] years and [are eligible for re-election [for a further term of five years]] [, subject to article 38, paragraph 2, are not eligible for re-election]. At the first election, one third of the judges chosen by lot shall serve for a term of [three] years [and are eligible for re-election]; one third of the judges chosen by lot shall serve for a term of [six] years; and the remainder shall serve for a term of [nine] years.[11]

11. Notwithstanding paragraph 10, a judge shall continue in office in order to complete any case the hearing of which has commenced.

Article 38

Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 37.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term[, and [if that period is less than three years] is eligible for re-election for a further term].

Article 39

The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier. They shall be eligible for re-election only once.

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[11] The need for staggering in the event of a change of number of judges can be addressed in the Rules of Procedure and Evidence.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President and the First and Second Vice-Presidents shall constitute the Presidency, which shall be responsible for:

(a) the due administration of the Court [, including the supervision and direction of the Registrar and staff of the Registry and the Court,][12] with the exception of the Office of the Prosecutor; and

(b) the other functions conferred on it by this Statute.

[4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern including, for example, the functioning of the Registry and security arrangements for defendants, witnesses and the Court.]

Article 40

Chambers

1. The Appeals Chamber [shall be established as soon as possible after the election of the judges. It] shall consist of [three] [five] [seven] judges to be elected by an absolute majority of the judges of the Court.[13] [At least one third of the judges must possess the qualifications set out in paragraph 3 (b) [(i)] [(ii)] of article 37.]

2. Judges of the Appeals Chamber shall serve [for a period of three years [and may be re-elected]] [until the end of their terms of office as judges of the Court]. They may, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. The Presidency shall assign judges who are not members of the Appeals Chamber to Trial Chambers and [Pre-Trial Chambers] [the Pre-Trial Chamber] in

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[12] Detailed administrative arrangements on, e.g., consultation with the Prosecutor for specific matters of mutual concern, could be dealt with in the Rules.

[13] Consideration needs to be given to whether the members of the Presidency of the Court should be members of the Appeals Chamber.

accordance with the [Rules of Procedure and Evidence] [Regulations of the Court].[14]

[4. Judges of the Pre-Trial Chamber or the Trial Chambers, as the case may be, shall serve in their respective Chambers for a period of three years. They may, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.]

5. A Trial Chamber shall consist of [three] [five] judges. [[At least one of] [A majority of] [All] the judges must possess the qualifications set out in paragraph 3 (b) (i) of article 37.]

6. [A] [The] Pre-Trial Chamber shall consist of [one judge] [three judges] and shall perform such pre-trial functions as are assigned to it by this Statute. [The number of judges may be [increased to three] [reduced to one][15] in accordance with the Rules of Procedure and Evidence]. [[The judge] [At least two judges] must possess the qualifications set out in paragraph 3 (b) (i) of article 37.]

[7. At the time a Chamber is constituted, alternate judges [may] [shall] be nominated by the Presidency to attend the proceedings of that Chamber and, provided that an alternate judge has been present throughout the proceedings, that judge may act as a member of that Chamber in the event that a judge of that Chamber dies, is disqualified or otherwise becomes unavailable during the course of the proceedings.][16]

Article 41

Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges serving on a full-time basis shall not engage in any other occupation of a professional nature.

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[14] Mechanisms that could be adopted for this purpose could include the assignment of judges to specific Chambers by lot, the rotation of judges, judges assigned to specific Chambers for a fixed term or fixed teams of judges with a team assigned to be the Trial Chamber and another team assigned to be the Pre-Trial Chamber for a given case.

[15] These options are linked to the earlier provision on the number of judges for the Chamber.

[16] This paragraph needs to be harmonized with paragraph 1 of article 72 and other provisions, if any, dealing with alternate judges for judicial proceedings other than trial proceedings.

4. Any doubt on the points raised in paragraphs 2 and 3 shall be decided by an absolute majority of the judges of the Court. Where any question concerns an individual judge, that judge shall not take part in the decision.

Article 42

Excusing and disqualification of judges

1. The Presidency may at the request of a judge excuse that judge from the exercise of a function under this Statute, in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court].

2. Judges shall not participate in any case in which their impartiality might reasonably be doubted on any ground. A judge shall be excluded from a case in accordance with this paragraph if, inter alia, he or she has previously been involved in any capacity in that case before the Court or in a related criminal case involving the accused at the national level [, or is a national of a complainant State, [of the State on whose territory the offence is alleged to have been committed] or of a State of which the accused is a national].

3. The Prosecutor [or] the accused [or an interested State] may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges of the Court.[17] The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 43

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving [complaints] [or] [referrals] [or any substantiated information related to the alleged commission of a crime under the jurisdiction of the Court], for examining them and for conducting investigations and prosecutions before the Court. A member of the Office of the Prosecutor shall not seek or act on instructions from any external source.

2. The Office of the Prosecutor shall be headed by the Prosecutor. [Without prejudice to article 47, the] [The] Prosecutor shall have full authority over the management and administration of the Office of the Prosecutor, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who are entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy

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[17] Some delegations expressed the view that questions of disqualification should be decided by an absolute majority of the members of the Chamber concerned.

Prosecutors shall be of different nationalities [and represent different legal systems]. They shall [be available to] serve on a full-time basis.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character, be highly competent in and have [at least ten years] [extensive] practical experience in the prosecution [or trial][18] of criminal cases. They shall, furthermore, have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor [and the Deputy Prosecutors] shall be elected by secret ballot by an absolute majority of the States Parties.[19] [The Deputy Prosecutors shall be appointed by the Prosecutor.[20]] Unless a shorter term is otherwise decided on at the time of their election [or appointment], they shall hold office for a term of [five] [seven] [nine] years and are [not] eligible for re-election. The Prosecutor and Deputy Prosecutors may not be over 65 years of age at the time of election [or appointment].

5. The Prosecutor and Deputy Prosecutors shall not engage in any activity which is likely to interfere with their prosecutorial functions or to affect confidence in their independence. [When serving on a full-time basis, they] [They] shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at his or her request from acting in a particular case.

7. [Neither the Prosecutor nor the Deputy Prosecutors shall participate in any matter in which their impartiality might reasonably be doubted on any ground.][21] They shall be excluded from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case involving the accused at the national level [, or are a national of a complainant State[, of the State on whose territory the offence is alleged to have been committed] or of a State of which the accused is a national].

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[18] Most delegations thought that both prosecutorial and judicial experience in criminal trials should be regarded as practical experience in that sense, but as some delegations felt that prosecutorial experience should be of paramount importance, the reference to "trial experience" was kept in square brackets.

[19] There ought to be a procedure for the Assembly to have a list of candidates rather than to have nominations put to the election directly, but it was felt that this was a matter for the rules of the Assembly.

[20] If this option is kept, there should be some system of involvement for the States parties, either by way of drawing up a list for the candidates or by having a possibility to object to an appointment by a certain number of States parties.

[21] Views were expressed that the reasons for doubts should be set out specifically.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by [the Presidency] [the Appeals Chamber] [the Judges of the Court]. The accused may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this paragraph. The Prosecutor or Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

[9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.][20]

[10. The Office of the Prosecutor shall be responsible for providing protective measures to witnesses to be called by the Prosecution. The Office of the Prosecutor shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.][21]

Article 44

The Registry

1. Subject to article 43, the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court.

2. [The judges] [The States Parties] by an absolute majority by secret ballot shall elect a Registrar, who [, under the authority of the President of the Court,] shall be the principal administrative officer of the Court. They may [in the same manner elect] [appoint] a Deputy Registrar if the need arises.

3. The Registrar shall hold office for a term of [five] [nine] years, is [not] eligible for re-election [once] and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on by an absolute majority of the judges, and may be [elected] [appointed] on the basis that the Deputy Registrar is willing to serve as required. [Their term shall end in all cases when they reach 65 years of age.] The Registrar and the Deputy Registrar shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

[4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide counselling and other assistance to victims,

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[20] Many delegations preferred this to be in the Rules of Procedure and Evidence.

[21] Such staff could be available in the Victims and Witnesses Unit under article 44, paragraph 4, but some delegations felt that there was a need for such staff in the Office of the Prosecutor, too. Some delegations felt that at least the first sentence was already covered in article 68.

[defence][24] witnesses, their family members and others at risk on account of testimony given by such witnesses and shall advise the organs of the Court on appropriate measures of protection and other matters affecting the rights and the well-being of such persons. The unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.][25]

Article 45

Staff

1. The Registrar and the Prosecutor shall appoint such qualified staff of their respective offices, including investigators in case of the Prosecutor, as may be required.

2. In the employment of the staff, the Registrar and the Prosecutor shall ensure the highest standards of efficiency, competence and integrity and shall have regard to the criteria set forth in article 37, paragraph 8.

3. The staff regulations, which shall apply to the staff of all organs of the Court, shall be proposed by the Registrar with the agreement of the Presidency and the Prosecutor. Such regulations shall be circulated to the States Parties for comment, before they take effect. The Registrar shall take into account the comments made by States Parties.[26]

[4. Any State Party, intergovernmental organization [or non-governmental organization] may offer to detail personnel to assist with the work of any of the organs of the Court and to be considered for such work. The Prosecutor may accept any such offer for the Office of the Prosecutor. In any other case, the Presidency, in consultation with the Registrar, may accept the offer.][27]

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[24] Some delegations were of the view that there should be a separate unit for prosecution witnesses in the Office of the Prosecutor, as reflected in the bracketed language in article 43, paragraph 9; others were of the view that there should be only one unit located in the Registry.

[25] The relationship with paragraph 5 of article 68 was considered. Views were expressed that parts of paragraph 4 should appear in article 68.

[26] Some delegations wanted an approval procedure for the States parties to be set out in the Statute, whereas other delegations felt that circulation should be just for information.

[27] Some delegations felt that this was already covered under the part dealing with cooperation or that it should be addressed in that part.

Article 46

Solemn undertaking

Before first exercising their functions under the present Statute, judges, the Prosecutor, Deputy Prosecutors, the Registrar and the Deputy Registrar shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 47[28]

Removal from office

1. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who is found to have committed serious misconduct or a serious breach of his or her duties under this Statute [or the [Rules of Procedure and Evidence] [Regulations of the Court]], or to be unable to exercise the functions required by this Statute,[29] shall cease to hold office if a decision to this effect is made in accordance with paragraph 2.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) in the case of a judge, by an [absolute] [two-thirds] majority of the States Parties further to a recommendation adopted by a two-thirds majority of the other judges of the Court;

(b) in the case of the Prosecutor [or a Deputy Prosecutor], by an absolute majority of the States Parties;

[(c) in the case of a Deputy Prosecutor, by the Prosecutor or by an absolute majority of the States Parties;]

[(c)] [(d)] in the case of the Registrar or Deputy Registrar, by a majority vote of the [judges] [or the] [States Parties].

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[28] Several delegations expressed the view that a separate article is required in the Statute to deal with the general issue of expiry of terms of office. It was suggested that such an article should be drafted along the following lines:

> "The term of office of a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar ends upon the expiry of their term of office, death, resignation or removal from office in accordance with article 47."

[29] A number of delegations expressed the view that a separate procedure for removal of office in the case of an inability to exercise the functions required (through, for example, long-term illness or disability) should be set out in the Regulations of the Court.

3. The judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability otherwise to hold office is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court], but shall not otherwise participate in the consideration of the matter.

Article 48

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in paragraph 1 shall be subject to disciplinary measures, in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court].[30]

Article 49

Privileges and immunities

1. The judges, the Prosecutor, [the Deputy Prosecutors,] [the Registrar] [and the Deputy Registrar] shall [, when engaged in the business of the Court,] enjoy diplomatic privileges and immunities.

2. The [Deputy Prosecutors,] [the Registrar,] [the Deputy Registrar] [and] staff of the Office of the Prosecutor and the Registry shall enjoy the privileges, immunities and facilities necessary for the performance of their functions [in accordance with the Rules of Procedure and Evidence].

3. Counsel, experts, witnesses or any other person required at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court. [In particular and without prejudice to article 70, they shall, in respect of the words spoken or written and acts done by them in the discharge of their functions, be immune from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer discharging their functions.][31]

4. The privileges and immunities of:

(a) [a judge] [the members of the Presidency] and the Prosecutor may be waived by an absolute majority of the judges;

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[30] Several delegations expressed the view that this provision relating to disciplinary measures should be contained in the Rules.

[31] Some delegations felt that the principle set out in the first sentence was sufficient for the Statute and that any elaboration of that principle could be left for the Rules of Procedure and Evidence or the Host Country Agreement. Views were also expressed that this paragraph should be placed in article 68.

[(b) the other judges may be waived by the Presidency;]

(c) the Registrar may be waived by the Presidency;

(d) the Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor; and

(e) the Deputy Registrar and staff of the Registry may be waived by the Registrar.[32]

Article 50

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties [in the Rules of Procedure and Evidence]. These salaries and allowances may not be decreased during their terms of office.

Article 51

Working languages

1. The working languages of the Court shall be English and French, pursuant to the Rules of Procedure and Evidence.

2. The Court shall, at the request of any Party, authorize a language other than English or French to be used by that Party.

Article 52

Rules of Procedure and Evidence[33]

1. [Option 1

The Rules of Procedure and Evidence, including an elaboration of the elements of offenses that must be proven, annexed at ____, shall be an integral part of this Statute.]

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[32] A view was expressed that the President should be given the power to waive the privileges and immunities of the staff of the Registry and that the Prosecutor's privileges and immunities should be waived by the Deputy Prosecutors.

[33] References to the Rules in the Statute will have to be revisited and adjusted to the language used in this article (see also footnote 34 below).

[Option 2:

The Rules of Procedure and Evidence shall enter into force [upon adoption by the Assembly of States Parties by [an absolute majority] [a two-thirds majority of those present and voting]] [together with this Statute]. They shall be consistent with the Statute.]

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) any State Party;

(b) the judges acting by an absolute majority;

[(c) the Prosecutor].

They shall enter into force upon adoption by the Assembly of States Parties [by a [...] majority]. Any modification shall be consistent with this Statute.

[3. In urgent cases, the judges may by [consensus] [a two-thirds majority] draw up a rule to be applied provisionally until the Assembly of States Parties adopts, amends or rejects it.]

Article 53

Regulations of the Court[34]

1. As far as provided in this Statute or the Rules of Procedure and Evidence or otherwise necessary for the routine functioning of the Court, the judges shall by [a two-thirds] [an absolute] majority adopt the Regulations of the Court. The Regulations of the Court shall be consistent with the Statute and the Rules of Procedure and Evidence. [In the event of conflict, the Statute or the Rules of Procedure and Evidence shall prevail.]

2. The Prosecutor [and the Registrar] shall be consulted in the elaboration of the Regulations and any amendments thereto. [The Regulations of the Court and any amendments thereto shall be circulated to the States Parties for comment. The judges shall take into account the comments made by States Parties.]

3. The Regulations and any amendments thereto shall take effect immediately upon adoption by the judges, unless otherwise decided by the judges, and shall remain in effect unless a majority of States Parties objects to them.[35]

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[34] It was suggested that these provisions might be called "Rules of the Court" so as to enable a reference to the "Rules" in the Statute to refer to either of the sets of provisions, as appropriate.

[35] Some delegations wanted to see the procedure for objections to be clarified in the Rules of Procedure and Evidence.

PART 5. INVESTIGATION AND PROSECUTION

Article 54

Investigation of alleged crimes

1. On receiving a complaint [or upon notification of a decision of the Security Council referred to in article 10, paragraph 1,] [or ex officio upon any other substantiated information], the Prosecutor shall [subject to paragraphs 2 and 3] initiate an investigation unless the Prosecutor concludes that there is no reasonable basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the [Presidency] [Pre-Trial Chamber].

N.B. The term "reasonable basis" in the opening clause is also used in the criteria listed in paragraph 2 (i). If the latter is retained, a broader term in the opening clause might be necessary in order to cover all the criteria listed under paragraph 2.

[2. Prior to initiating investigation the Prosecutor shall:

(a) [notify the States Parties of any complaint [or any decision of the Security Council referred to in article 10, paragraph 1], and those States Parties shall so inform the persons within their jurisdiction who are referred to by name in the submission; and]

(b) determine whether:

(i) the complaint provides or is likely to provide a reasonable basis [in law or on the facts] for proceeding with a prosecution under this Statute; and

(ii) the case is or would be admissible under article 15; and

[(ii) bis a prosecution under this Statute would be [in the interests of justice] [taking into account the gravity of the offences] [and the interests of victims];

(iii) [an investigation would be consistent with the terms of any relevant Security Council decision]; and

(iv) to seek a preliminary ruling from the Court regarding the Court's jurisdiction if the case could later be challenged under article 17.]

[3. The Prosecutor shall not initiate an investigation where the submission of the case to the Court is challenged under article 15 within one month of notification under article 54, paragraph 2 (a) until the final ruling of the Court.]

4. The Prosecutor may:[1]

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence [documents, records and articles of evidence];

(c)

Option 1

conduct on-site investigations;

Option 2

(i) Except as provided for in this paragraph, when evidence is in the territory of a State, the Prosecutor shall, as necessary, seek the cooperation of that State in order to obtain that evidence. The Prosecutor may conduct investigations on the territory of a State only:

a. [with the consent of its competent authorities] [upon notification of and where necessary with the consent of its competent authorities] [in accordance with Part 9] [subject to the waiver by the competent authorities of the requirement of consent];

[b. When the Pre-Trial Chamber is satisfied that competent authorities to whom a request for assistance under Part 9 can be transmitted are not available [or not functioning].]

[(ii) In the case of paragraph (i) (b) above, [such investigations] [investigations of a non-compulsory nature[2]] shall be conducted with the [concurrence] [approval] of the Pre-Trial Chamber [which shall have regard to the views of [interested States]]. [Notification shall be given to the State in question, in particular for the purpose of the State obtaining an extension of the period for execution of a relevant request for judicial assistance.]

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[1] It was proposed that the following text be included as the first line of article 54, paragraph 4:

"When evidence is in the territory of a State Party whose competent authority is functioning properly, the Prosecutor shall request, as necessary, the Pre-Trial Chamber to seek the cooperation of a State Party pursuant to Part 9 of this Statute."

[2] This set of square brackets will apply if paragraph (iii) is accepted.

[(iii) In the case of paragraph (i) (b) above, the Prosecutor may use compulsory measures for collecting evidence (such as search and seizure and compelling the attendance of witnesses) based upon a valid warrant issued by the Pre-Trial Chamber.]

(d) take necessary measures to ensure the confidentiality of information or the protection of any person [, including victims];

[(e) The Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children;]

N.B. See also article 68, paragraph 2 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]).

(f) as appropriate, seek the cooperation of any State or of the United Nations, [or of any peacekeeping force that may be present in the territory where an investigation is to be undertaken];

[(g) where documents or information have been obtained by the Prosecutor upon a condition as to their confidentiality, which are, or are intended to be, used solely for the purposes of generating new evidence, agree that such documents or information will not be disclosed at any stage of the proceedings unless the provider of the information consents.]

N.B. This paragraph, as well as articles 58, paragraph 10 (d) and (f) (Commencement of prosecution), 61, paragraph 2 (Notification of the indictment), 67, paragraph 2, 68, paragraph 9 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]), 71 (Confidential information), 90, paragraphs 2 and 6 (Other forms of cooperation [and judicial and legal [mutual] assistance]) all relate to confidentiality and they should be examined with a view to avoiding any duplication or contradiction.

[(h) enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to secure the cooperation or assistance of a State or person in the investigation]

N.B. In the final drafting of paragraph 4, attention should be given to harmonizing the use of the words "shall" and "may".

5. The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, issue such subpoenas [, orders] and warrants as may be required for the purposes of an investigation, including a warrant under article 59, paragraph 1, for the pre-indictment arrest of a suspect.

6. If, upon investigation and having regard, inter alia, to the matters referred to in article 15, the Prosecutor concludes that [a case is inadmissible under article 15 or] there is [not a sufficient basis for a prosecution] [no prima facie case] under this Statute [or a prosecution would not be in the

interests of justice] [taking into account the interests of victims] and decides not to file an indictment, the Prosecutor shall so inform the [Presidency] [Pre-Trial Chamber], as well as the complainant State [or the Security Council, in a case to which article 10, paragraph 1, applies], giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

[7. A decision referred to in paragraph 6 based on considerations of the interests of justice shall only become effective upon its having been confirmed by the [Presidency] [Pre-Trial Chamber] under paragraph 8 of this article.]

8. At the request of a complainant State [or, in a case to which article 10, paragraph 1, applies, at the request of the Security Council,] the [Presidency] [Pre-Trial Chamber] [shall] [may] review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision [but it may do so only once] [: provided that the Prosecutor, any suspect and the complainant State [or the Security Council (as the case may be)] shall be informed of such review proceedings or confirmation proceedings within the contemplation of paragraph 6 of this article which involves a decision based on considerations of the interests of justice and shall be entitled to submit his/her/their/its viewpoints with regard thereto, which viewpoints shall be considered by the [Presidency] [Pre-Trial Chamber] in coming to its decision].

[When new information is brought to his/her attention regarding the facts in respect of which he or she decided not to initiate an investigation or not to institute proceedings, the Prosecutor may reconsider his/her decision.]

[9. After a determination to initiate an investigation in accordance with article 54, paragraph 4, and prior to the commencement of a trial, a State requested by the Prosecutor to carry out investigations or a State on the territory of which the Prosecutor intends to conduct investigations may challenge the decision of the Prosecutor to initiate an investigation before the Pre-Trial Chamber on the grounds of lack of sufficient basis for a prosecution under this Statute.]

10. A person suspected of a crime under this Statute shall have the right:

(a) prior to being questioned, to be informed that the person is a suspect [, of the conduct that the person is alleged to have committed which may constitute a crime under this Statute] and of the rights under (b) to (d) hereafter;

(b) to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) to have [at all times] [in connection with questioning] the [prompt] [competent] legal assistance of the person's choosing; [or, if the person does not have legal assistance, to have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the person lacks sufficient means to pay for such assistance];

[(d) to be questioned in the presence of counsel unless the suspect has voluntarily waived his or her right to counsel;]

(e) not to be compelled to testify or to confess guilt nor to be subjected to any form of coercion, duress or threat;

(f) if questioned in a language other than [a language the person understands and speaks] [his or her own language], to have, free of any cost, the assistance of a competent interpreter and a translation of any document on which the person is to be questioned;

(g) not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

[11. Evidence obtained during questioning in violation of these rights shall under no circumstances be used in the trial unless they are favourable to the suspect.][3]

[12. (a) The Prosecutor shall fully respect the rights of suspects under the Statute and the Rules of Procedure and Evidence.

(b) [To establish the truth the Prosecutor shall [ex officio] extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may follow. The Prosecutor shall investigate equally incriminating and exonerating circumstances.]

(c) [If the Prosecutor concludes that there is a basis for prosecution under this Statute, he shall, in accordance with the Rules of Procedure and Evidence, investigate the case by seeking the cooperation of the States concerned or by himself, and such investigation shall be conducted in conformity with international law and fully respecting the sovereignty of the States concerned.]][4]

[13. (a) A person suspected of committing a crime within the meaning of this Statute:

(i) shall, as soon as he is involved in an investigation or prosecuted under this Statute, be entitled to collect all of the evidence that he deems necessary for his defence;

(ii) may either collect this evidence himself or request the Pre-Trial Chamber of the Court to accomplish certain acts, seeking, where necessary, cooperation from any State Party.

The Pre-Trial Chamber may reject the request.

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[3] This paragraph will be discussed in connection with article 69.

[4] This paragraph will be discussed in connection with article 43.

(b) If the suspect elects to collect the evidence himself in accordance with this paragraph, he may apply to the [Presidency] [Pre-Trial Chamber] for the following orders and subpoenas: [list to be inserted]]

N.B.

- **In view of the length of the article, consideration may be given to placing some of its elements in a separate article.**

- **The drafting of this article might need revision in the light of the decisions to be taken in respect of article 57 (Functions of the Pre-Trial Chamber in relation with investigation).**

[Article 55

Information on national investigations or proceedings

1. [A State Party shall promptly inform the Prosecutor] [At any time, a State Party may inform the Prosecutor] [Where the Court has jurisdiction over a crime pursuant to articles 6 and 7, the Court may request a State Party to inform it] about national investigations or proceedings as soon as it considers that any such investigations or proceedings involve the commission of a crime within the jurisdiction of the Court. Such information shall, at the request of the State Party concerned, be confidential and shall include a concise statement of the circumstances of the alleged crime, the status of the investigation or proceeding concerned and, where possible, the identity and whereabouts of any suspect or accused.

The Prosecutor may subsequently request the State Party to provide additional information about the national investigations or proceedings.

2. The Prosecutor may, after examining the information received from a State Party under paragraph 1 and having regard to the matters referred to in article 15, decide to initiate an investigation pursuant to articles 12 and 54. For that purpose, he may seek a ruling from the Pre-Trial Chamber in accordance with article 17.]

[Article 56

Deferral of an investigation by the Prosecutor[5]

1. In the event that the Prosecutor, having regard to the matters referred to in article 15, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. Such information shall, at the request of the State concerned, be confidential.

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[5] A view was expressed that article 56 could be examined in the context of article 54.

2. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of whose proceedings deferral has taken place.]

[Article 57][6]

Functions of the Pre-Trial Chamber in relation with investigation[7]

1. [Where the Prosecutor intends to take an investigative action which may] [When the Prosecutor considers an investigation to] present a unique opportunity, which may not be available subsequently for the purposes of a trial, to take testimony or a statement from a witness, or to examine, collect or test evidence, [the Prosecutor shall] [, if the suspect/accused has not been identified or is not available] inform the Pre-Trial Chamber; and] the Pre-Trial Chamber, on the request of the Prosecutor, [or a suspect,] [or on its own initiative,] may take such measures as may be necessary to assure the efficiency and integrity of the proceedings, and in particular to protect the rights of the defence.

2. These measures may include the power:

(a) to make [orders] [recommendations] [orders and recommendations] regarding procedures to be followed;

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[6] Article 57 was tabled by some 15 interested delegations at the August 1997 meeting of the Preparatory Committee. It was written de novo and did not derive from any particular delegation's proposal.

The proposal contemplates that, in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the interests of the defence.

Some delegations believed that the authority of the Pre-Trial Chamber set out in the proposal should be exercised only to collect and preserve evidence for the defence. In relation to the Prosecutor's investigation, the Pre-Trial Chamber should only intervene for the purpose of checking on the lawfulness of the Prosecutor's conduct.

The alternative options reflect differing views as to the balance to be struck between the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber.

If this proposal is adopted, it seems likely that other proposals in relation to article 54 could be deleted or may need revision. Consideration would need to be given to article 54, paragraphs 1, 4 (a), (b), (c), (f) and (h), 5, 6, 7, 8, 9 and 13.

[7] The powers contemplated by this draft provision include the power for the Pre-Trial Chamber to seek judicial assistance from a State.

(b) to direct that a record be made of the proceedings;

(c) to appoint an expert to assist;

(d) to authorize counsel for a suspect to assist, or where suspects have not been identified or have not designated counsel, appoint a lawyer to attend and represent the interest of the defence;

(e) to name one of its members [or an available judge of the Court]:

(i) to observe and make [orders] [recommendations] [orders and recommendations] regarding the collection and preservation of evidence or the questioning of persons;

(ii) to decide on questions of law; or

(iii) to take such other actions as may be necessary to collect or preserve evidence [favourable to the defence] [relevant to the case].

Option: [When in the course of a proceeding a unique opportunity presents itself to collect evidence, the Pre-Trial Chamber may, at the request of the Prosecutor or of the suspect, name one of its members or an available judge of the Court to take necessary measures to collect or preserve evidence, while respecting the rights of the defence.]

3. [If any [order] [recommendation] [order and recommendation] of the Pre-Trial Chamber is breached or is not complied with, the Pre-Trial Chamber may:

(a) reject the admissibility of any evidence obtained as a result or consequence of such a breach or non-compliance; or

(b) consider such breach or non-compliance in respect of whether any weight should be attached to any evidence obtained as a result or consequence of such breach or non-compliance.]

Article 58

Commencement of prosecution

1. If upon investigation [in the course of an investigation] the Prosecutor, having regard to the matters referred to in article 15, concludes that [the case is admissible, and] [a case does exist against one or more persons named,] [there is a prima facie case] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial,] [which the accused could be called on to answer and that is desirable in the interests of justice that the case should proceed], the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged in respect of each of the persons referred to, their name and particulars, a statement of the allegations of fact against them, and the characterization of these facts within

the jurisdiction of the Court and shall be accompanied by [relevant] [sufficient] evidence collected by the Prosecutor for the purposes of confirmation [of the indictment] by the [Presidency] [Pre-Trial Chamber].

[2. The [Presidency] [Pre-Trial Chamber] shall examine the indictment, any amendment and any supporting material and determine whether:

(a) [a prima facie case exists] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial] [there is strong evidence against the accused] with respect to a crime within the jurisdiction of the Court; and

(b) having regard, inter alia, to the matters referred to in article 15, the case should on the information available be heard by the Court [if the Court has not yet ruled on this issue];

[(c) it is desirable in the interests of justice that the case should proceed;]

If so, it shall [by majority/consensus] confirm the indictment and establish a trial chamber in accordance with article 40 [, and inform the Presidency].]

[3. Any State concerned may challenge the decision of the Prosecutor to file an indictment before the Pre-Trial Chamber on grounds of inconsistency with this Statute.]

[4. After the filing of an indictment, the Pre-Trial Chamber shall [in any case] [if the accused is in custody or has been judicially released by the Court pending trial] notify the indictment to the accused, [set a deadline prior to the confirmation hearing, until which the Prosecutor and the defence may add new evidence [for purposes of such confirmation hearing]], and set a date for the review of the indictment. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his/her counsel, subject to the provisions of paragraph 8. In the hearing, the accused shall be allowed to object to the indictment and criticize the material on which it is based.

Following the hearing, the Pre-Trial Chamber may:

(a) confirm the indictment in its entirety;

(b) confirm only part of the indictment [and amend it], by giving a different qualification to the facts;

[(c) order further investigation];

(d) refuse to confirm the indictment.

When it confirms the indictment in its entirety or in part, the Pre-Trial Chamber shall commit the accused to the Trial Chamber for trial on the indictment as confirmed. Confirmation of indictment shall uphold the warrants issued earlier, except if the Court decides otherwise.]

5. If, after any adjournment that may be necessary to allow additional material to be produced, the [Presidency] [Pre-Trial Chamber] decides not to confirm the indictment, it shall so inform the complainant State [or, in a case to which article 10, paragraph 1, applies, the Security Council].

[If it does not confirm the indictment, all the warrants issued prior to the decision of non-confirmation shall cease immediately to have effect.]

[6. The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional evidence.]

[7.

Option 1

The [Presidency] [Pre-Trial Chamber] may [, on its own or] at the request of the Prosecutor amend the indictment [, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence] [after hearing the accused, provided that the Trial Chamber is satisfied that the accused is not prejudiced in his rights to defend himself].]

Option 2

Prior to the confirmation of the indictment by the Pre-Trial Chamber, the Prosecutor may amend or withdraw the indictment. [The accused shall be informed of the withdrawal as well as of any amendment. In the event of withdrawal, the Pre-Trial Chamber may, under the provisions provided for in article 54, ask the Prosecutor to reconsider his/her decision.]

After the confirmation of the indictment, the Prosecutor may amend the indictment only with the permission of the Pre-Trial Chamber, and after notice to the accused. If the Prosecutor is seeking to add additional charges or to substitute more serious charges for those in the confirmed indictment, the new or amended charges must be confirmed by the Pre-Trial Chamber in accordance with the procedures for confirmation of the indictment set out in paragraph [...].

After the commencement of the trial, the Prosecutor may withdraw the indictment or certain charges within the indictment only with the permission of the Trial Chamber].

[In case of withdrawal of the indictment after the confirmation thereof, new prosecution may be instituted for the same offence only based upon a newly discovered material evidence which was not available to the Prosecutor at the time of the withdrawal in the interest of the defence.]

N.B. Consideration may be given to limiting paragraph 7 to the main principles regarding amendment and withdrawal of the indictment while addressing the details in the Rules of Procedure and Evidence.

[8.[8] When one or more of the accused has fled or cannot be found, and when all reasonable steps have been taken to inform the accused, the Pre-Trial Chamber may still hold a hearing in order to examine whether it shall confirm the indictment. In that case, the accused cannot be represented by counsel.

When it confirms the indictment, in its entirety or in part, against an accused who has fled or cannot be found, the Pre-Trial Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial.]

[9. Anyone who has [personally] suffered [direct] injury caused by a crime submitted to the Court, [the legal representatives of victims, victims' relatives, successors and assigns,] may inform the [Prosecutor] [and the] [Pre-Trial Chamber] in writing of the acts having caused injury to him/her/them and the nature and amount of the losses which he/she/they has/have sustained.

When it confirms the indictment, in its entirety or in part, the Pre-Trial Chamber may order provisional measures which may be necessary [in order to enable a Trial Chamber, upon a subsequent conviction,] to compensate the victim designated in the above paragraph. For that purpose, the Pre-Trial Chamber shall seek the cooperation of the interested States.

Such provisions shall also apply when the accused has fled or cannot be found.]

N.B. Paragraph 9 should be reviewed in the light of article 73 (Reparations to victims).

10. The [Presidency] [Pre-Trial Chamber] [Trial Chamber] may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b)

Option 1

requiring the disclosure to the defence [of the relevant evidence that the defence requests] within a sufficient time before the trial to enable the preparation of the defence, of [relevant] documentary or other evidence available to the Prosecutor [, whether or not the Prosecutor intends to rely on that evidence] [which the Prosecutor intends to rely upon]; [if the Prosecutor fails to comply with an order under this subparagraph, the evidence in question will be inadmissible at the trial;]

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[8] The Preparatory Committee decided to defer the consideration of paragraph 8 of article 58 for such time as article 63 is considered.

Option 2

save in respect of documents or information referred to in article 54, paragraph 4 (g), and subject to subparagraph (f) below, requiring the disclosure to the defence of documents or information which are either considered [material] [relevant] to the preparation of the defence, or are intended for use by the Prosecutor at trial or were obtained from the accused;[9]

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection of the accused, victims and witnesses and of confidential information;

(e) providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection and privacy of victims and witnesses;

[(f) providing, at the request of either party or a State, or at the instance of the Court of its own volition, for the non-disclosure or protection of documents or information provided by a State the disclosure of which would [endanger] [prejudice] the national security or national defence interests of a State in accordance with criteria to be specified in rules made pursuant to this Statute.]

N.B. Subparagraphs (d), (e) and (f) of paragraph 10 could be consolidated further.

Article 59

Arrest

1. At any time after an investigation has been initiated, the [Presidency] [Pre-Trial Chamber] may at the request of the Prosecutor issue a warrant for the pre-indictment arrest of a suspect if there are reasonable grounds[10] [11] to believe that:

(a) the suspect has committed a crime within the jurisdiction of the Court; and

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[9] [Quaere: definition of "relevant" for the Rules of Procedure and Evidence?]

[10] The term "reasonable grounds" was understood to embody objective criteria.

[11] Some delegations preferred other terms such as "serious reasons".

(b) taking the suspect into custody is necessary to ensure that the suspect does not:

(i) fail to appear for trial;

[(ii) [interfere with or destroy evidence;][12]

[(iii) [intimidate] [influence] witnesses or victims;]

[(iv) engage in collusion with accomplices;] or

[(v) [continue to commit a crime within the jurisdiction of the Court.][13]

[The Pre-Trial Chamber may also issue a warrant of judicial supervision in order to place a person under restrictions of liberty other than arrest.][14]

[No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court.][15]

2. (a) The warrant for the pre-indictment arrest shall be deemed to have lapsed and the request for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the arrest, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

(b) In the case of a State Party which has notified the Court under article 88, paragraph 2, that it can surrender pre-indictment, the warrant for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the surrender, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

If the Prosecutor decides not to indict the suspect or the [Presidency] [Pre-Trial Chamber] decides not to [confirm the indictment] [not to issue a

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[12] Some delegations suggested that subparagraphs (ii), (iii) and (iv) could be merged under a more general formulation such as "obstructing or endangering the investigation or the court proceedings".

[13] Some delegations favoured addressing situations in which the accused may be harmed or at risk. Other delegations stated that the accused could be adequately protected under article 68.

[14] It was suggested that this provision could be deleted because it is addressed in article 60, paragraph 6.

[15] It was suggested that this provision could be moved to article 54, paragraph 10.

post-indictment warrant], the Prosecutor shall immediately advise the custodial State of that fact.[16]

3. "Opening clause":

Option 1

[In the case where no pre-indictment warrant has been obtained,] [Prior to the confirmation hearing,] [As soon as practicable] [after the confirmation of the indictment], the Prosecutor shall seek from the [Presidency] [Pre-Trial Chamber] a [post-indictment] warrant for the arrest and transfer of the accused. The [Presidency] [Pre-Trial Chamber] shall issue such a warrant unless it is satisfied that:

Option 2

Upon confirmation of the indictment, a warrant for the arrest of the accused shall be issued by the Pre-Trial Chamber, unless, having heard the views of the Prosecutor, it is satisfied that:

(a) the accused will voluntarily appear for trial and none of the other factors in paragraph 1 (b) are present]; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. The Court[17] shall transmit the warrant to any State where the person may be located, along with a request for the provisional arrest, or arrest and [surrender, transfer, extradition] of the person under Part 9.

5. [Pre-indictment and post-indictment warrants may also be issued when the accused is a fugitive. In this case, the post-indictment warrant issued by the Pre-Trial Chamber shall have the effect of an international warrant and shall be disseminated by all appropriate means. When the accused is apprehended, the authorities shall proceed as provided for in Part 9.]

6. [A post-indictment warrant shall remain in effect until the date of the judgement. The effects of the warrant delivered by the Pre-Trial Chamber shall not be interrupted by the actions challenging the submission of cases to the Court.]

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[16] It was suggested that the questions of release and re-arrest could be addressed in another provision of this Statute.

[17] The term "Court" is understood to include its constituent organs, including the Prosecutor, as defined in article 35.

Article 60

Pre-trial detention or release

1. [The States [Parties] [in which the person is located] [and in which the crime was committed] shall be notified of a warrant issued by the Pre-Trial Chamber.] The State that has received a pre- or post-indictment warrant and a request for the arrest of a person under article 59, paragraph 5, shall immediately [in accordance with its laws][18] [[and] in accordance with the provisions of Part 9 of this Statute] take steps to arrest the suspect [on the basis of the warrant issued by the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request].[19]

[2. The Prosecutor may, with the consent of the Pre-Trial Chamber, execute a warrant for arrest by him or herself only in cases where the competent authority of the State Party concerned may not be available or may be ineffective.][20]

3. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person and the person has been arrested in accordance with the proper process and that the person's rights have been respected.

4. The person shall have the right to apply to [the competent judicial authority in the custodial State] [the Pre-Trial Chamber] for interim release pending [surrender] [transfer] [extradition] [in accordance with its national law]. [The custodial State shall take into account the views of the Prosecutor [and Court] on interim release.]

N.B. The term "Court", if retained in this paragraph, should be clarified.

5. After the [decision to] [surrender] [transfer] [extradite] to the Court, the person may apply to the [Presidency] [Pre-Trial Chamber] for interim release pending trial.

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[18] Under article 59, paragraph 5, a warrant for pre-indictment arrest is forwarded to the State in which the individual sought may be located, along with a request for provisional arrest or transfer/surrender under Part 9. If Part 9 specifies the extent to which national laws apply to requests for provisional arrest or transfer/surrender, it will be unnecessary to treat this issue here as well.

[19] The issue of whether a State can decline to arrest and detain a person, pending resolution of a challenge under article 17, could be dealt with in that article.

[20] This provision raises a host of issues, including under what conditions the Prosecutor should be able to exercise such authority, whether the Prosecutor would have adequate resources to do so, and whether such issues should be addressed elsewhere in the Statute.

6. The person shall be detained unless the [Presidency] [Pre-Trial Chamber] is satisfied that the person will voluntarily appear for trial and none of the other factors in article 59, paragraph 1 (b), are present. If it decides to release the person, it may do so with or without conditions [or may issue a warrant of judicial supervision restricting the person's liberty other than by arrest]. [The [Presidency] [Pre-Trial Chamber] shall also, on its own initiative, review its ruling periodically. If satisfied that changed circumstances require that the ruling be modified, it may order any measure provided for in paragraph 5.]

N.B. Reference to "any measure provided for in paragraph 5" should be revised in the light of the current language of paragraph 5.

7. (a) The [Presidency] [Pre-Trial Chamber] may, either of its own initiative or at the request of the person concerned or the Prosecutor, modify its ruling as to detention [, judicial supervision] or conditional release in effect at that time.

[(b) The person may be detained prior to trial for a maximum of one year; however, this period may be extended up to an additional year by the [Presidency] [Pre-Trial Chamber] if the Prosecutor can demonstrate that he or she will be ready for trial within that period and can show good cause for the delay.]

(c) The person and the Prosecutor may appeal the [Presidency's] [Pre-Trial Chamber's] determination regarding release or detention to the Appeals Chamber.

8. If necessary, the [Presidency] [Pre-Trial Chamber] may issue a warrant of arrest to secure the presence of an accused who has been released.

9. A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court. If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article ...].[21]

10. [A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held, or if necessary in the host State.] [Once ordered [surrendered] [transferred] [extradited] by the custodial State, the person shall be delivered to the Court as soon as possible, and shall be held in an appropriate place of detention in the host State or other State in which the trial is to be held.]

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[21] This paragraph should be reviewed in the light of the text of article 84.

Article 61[22]

Notification of the indictment

N.B. It might be necessary to broaden the title of this article to cover the whole of its content.

1. The [Prosecutor] [Registrar] shall ensure, where necessary with the cooperation of national authorities, that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, [in a language that the accused understands] [in his own language]:

(a) in the case of the pre-indictment arrest of a suspect, [a statement of the grounds for the arrest] [the warrant of arrest or restriction of liberty];

(b) in any other case, the confirmed indictment;

(c) a statement of the [accused's] [arrested person's] rights under [articles 54 or 67 of] this Statute and the Rules [, as applicable].

[2. An indictment shall be made public, except in the following situations:

(a) The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or in the case of joint accused, on all the accused. In exercising its discretion, the [Presidency] [Pre-Trial Chamber] shall take account of all relevant factors, including the potential for pre-arrest flight of an accused, destruction of evidence and harm to victims or witnesses if the indictment is made public;

(b)[23] The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.]

3. In any case to which paragraph 1 (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

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[22] The wording of this article might be modified in the light of the decisions to be taken as regards the question of hearing of the confirmation of an indictment.

[23] The contents of this subparagraph could become the subject matter of the provision being negotiated on questions of confidentiality, disclosure and protection of information.

4. If, 60[34] days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 59, paragraph 3, or for some reason the requirements of paragraph 1 cannot be complied with, the [Presidency] [Pre-Trial Chamber] [the Registrar] [may] [shall] on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

[5. [The accused] [Anyone suspected of committing a crime within the meaning of this Statute] shall be entitled:

(a) to be informed promptly of the nature and cause of the charge against him or her [and be questioned in a language which he understands, and, to this end, to have the free assistance of a competent interpreter, and to be provided free of charge with a translation of the documents on the basis of which he is being questioned or that show why a measure infringing upon his liberty or property has been proposed];

(b) [to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel;] [to be assisted promptly by a lawyer of his own choosing, or, if he does not have sufficient means to pay for one, by a lawyer appointed by the [Pre-Trial Chamber of the] Court;]

(c) [before being questioned, or when a measure infringing upon his liberty or property has been proposed and brought to his attention, to be fully informed of the charges against him and the rights to which he is entitled under paragraph 1 of this article.]]

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[34] The matter concerning a specific deadline may be more appropriate for the rules of procedure.

Further option for articles 58 to 61[25] [26]

Article 58

Issuance by the Pre-Trial Chamber of an arrest warrant or a summons to appear[27]

1. At any time after an investigation has been initiated, the Pre-Trial Chamber may, at the application of the Prosecutor, issue a warrant for the arrest for a person if:

(a) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) it appears that the arrest of the person is necessary to assure the person's appearance at trial, to assure that the person does not obstruct or endanger the investigation or the court proceedings, [or to prevent the person from continuing to commit a crime within the jurisdiction of the Court].

2. The application shall specify:

(a) the name of the person or persons, and any other relevant identifying information;

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[25] The proposal represents a simplified and somewhat restructured text for articles 58 through 61. This simplified version of these articles has been achieved as a result of adoption of the framework outlined in A/AC.249/1998/WG.4/DP.36 and the withdrawal or abbreviation by many delegations of their proposals currently contained in A/AC.249/1998/L.13. This reflects a decision by many of the authors to move away from national positions towards a single, straightforward procedural approach, acceptable to delegations representing different national legal systems.

The proposal does not attempt to resolve issues such as the trigger mechanism or powers of the Prosecutor. Similarly, it does not attempt to incorporate at this time procedures relating to challenges to admissibility or jurisdiction.

The purpose of the proposed text, if delegations agree, is to provide a basis for a more focused and efficient discussion in Rome of the procedural stages addressed in the above articles 58 through 61.

[26] A view was expressed that the proposal for articles 58 to 61 under this option omits procedures of substantive nature which have been included in the text of the same articles above.

[27] Provisions in the option for article 59 presented on page 87 ("[No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court.]") should be moved to article 54.

(b) the specific crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) a concise statement of the facts which are alleged to constitute those crimes;

(d) a summary of the evidence and any other information which form reasonable grounds to believe the person committed those crimes; and

(e) the reason why the Prosecutor believes the arrest of the person is necessary.

3. The Pre-Trial Chamber shall examine the application and the evidence or other information submitted by the Prosecutor and, if satisfied that there are reasonable grounds to believe that the person named committed the crimes alleged and that the arrest of the person appears necessary, shall issue a warrant for the arrest of the person. The warrant of arrest shall identify the person to be arrested and the crimes for which the person's arrest is sought, and shall contain a concise statement of the facts which are alleged to constitute those crimes. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

4. Based on the arrest warrant, the Court may request the provisional arrest, or the arrest and [surrender][extradition] of the person under Part 9.

[5. Prior to the [surrender][extradition] of the person, the Prosecutor may request that the Pre-Trial Chamber amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe the person committed the modified or additional crimes.][28]

6. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to assure the person's appearance, it shall issue the summons for the person to appear on a specified date. The summons shall identify the person summoned and the crimes which the person is alleged to have committed, and shall contain a concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person. [The Pre-Trial Chamber may request the State that serves the summons to place the person under restrictions of liberty, if permitted by the law of that State.][29]

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[28] Such a provision may be necessary, particularly if a strict rule of specialty were adopted.

[29] The question whether the Pre-Trial Chamber shall have the possibility to request the State that serves the summons to place the person under restrictions of liberty, despite the fact that it found that a summons is sufficient to assure the person's appearance, will have to be examined.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and [surrender][extradition] shall immediately take steps to arrest the suspect in accordance with its laws and the provisions of Part 9.[30]

2. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person, that the person has been arrested in accordance with the proper process, and that the person's rights have been respected.

3. The person arrested shall have the right to apply for interim release pending [surrender][extradition] to [the Pre-Trial Chamber][the competent judicial authority in the custodial State in accordance with its national law. The custodial State shall take into account the views of the Prosecutor and the Court regarding the interim release.]

[4. Pending a decision on [surrender][extradition], a person may apply to the Pre-Trial Chamber for a determination of the lawfulness under this Statute of any arrest warrant issued by the Court. If the Pre-Trial Chamber decides that the arrest warrant was unlawful under the Statute, it shall order the release of the person.][31]

5. Once ordered to be [surrendered][extradited] by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the [surrender][extradition] of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. However, the person shall be detained unless the Pre-Trial

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[30] It is contemplated that, in unusual circumstances, for example of grave illness, the State might, if permitted by its law, place the person under judicial supervision rather than arrest the person and take him into custody.

[31] Serious questions were raised about on what grounds such a challenge would be based and whether this provision was needed at all in light of the procedures for judicial review of the arrest warrant and judicial confirmation of the charges for trial.

Chamber is satisfied that the person, if released, will appear for trial, will not obstruct or endanger the investigation or the Court's proceedings[, or will not continue to commit crimes within the jurisdiction of the Court]. If it decides to release the person, the Pre-Trial Chamber may do so with or without conditions, including conditions restricting the person's liberty.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or accused.[32] Upon such review, it may modify its ruling as to detention, release, or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall assure that a person is not detained for an unreasonable period prior to trial due to unexcusable delay by the Prosecutor. If such delay has occurred, the Court shall consider releasing the person pursuant to conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released.

Article 61

Confirmation of the charges before trial[33]

1. Within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel[, unless -

(a) the person has waived his right to be present; or

(b) the person has fled or cannot be found and all reasonable steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held, in which case the person shall not be represented by counsel].

2. A reasonable time before the hearing, the person shall be provided with a copy of the charges on which the Prosecutor intends to seek trial, and be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may make orders regarding the disclosure of information

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[32] A view was expressed that there should be a specific time limit in the Statute within which the Pre-Trial Chamber must review a detention decision.

[33] Paragraph 9 of the option for article 58 presented on page 85 referred to the power of the Pre-Trial Chamber to order provisional measures to preserve the Court's ability to order compensation to victims. It is suggested that this concept be moved to article 57, paragraph 2, and be among the general powers of the Pre-Trial Chamber and not only exercisable at the time of confirmation.

for purposes of the hearing as may be appropriate under the Statute and the Rules.

3. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any proposed charges. The accused shall be given reasonable notice before the hearing of any amendment or withdrawal of proposed charges.

4. At the hearing, the Prosecutor shall have the burden of presenting, for each charge on which he seeks trial, sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

5. At the hearing, the accused person may object to the proposed charges, criticize the evidence presented by the Prosecutor and present evidence on his or her own behalf.

6. The Pre-Trial Chamber shall determine whether, considering the presentations by both the Prosecutor and the accused, there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.[34] Based on its determinations, the Pre-Trial Chamber may:[35]

(a) confirm those proposed charges as to which it has determined there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) refuse to confirm those proposed charges as to which it has determined there is insufficient evidence;

(c) adjourn the hearing and request the Prosecutor to consider -

(i) providing further evidence or conduct further investigation with respect to a particular charge; or

(ii) amending a proposed charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.[36]

7. After the charges are confirmed and before the trial has begun, the Prosecutor may amend the charges, but only with the permission of the Pre-Trial

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[34] A decision needs to be made whether any hearing on admissibility will be held separately, or whether admissibility issues raised by the accused should also be considered at this hearing.

[35] The question remains whether the decisions of the Pre-Trial Chamber on confirmation of the charges should be unanimous or by majority vote.

[36] Amending the charge may have implications under a rule of speciality provision.

Chamber and after notice to the accused. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this Article to confirm those charges must be held. After commencement of the trial, the Prosecutor may withdraw the charges only with the permission of the Trial Chamber.

8. A previously issued warrant shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

PART 6. THE TRIAL

Article 62

Place of trial

1. Unless otherwise decided in accordance with paragraph 2, the place of the trial will be the seat of the Court.

2. The [Presidency] [Assembly of the State parties] may authorize the Court to exercise its functions at a place other than its seat [where it will ensure the efficient conduct of the trial and is in the interest of justice] [or] [when trial by the members of the Court is likely to make the proceedings simpler and less costly]

3. [(a) The Presidency of the Court shall make inquiries with the State Party that appears likely to receive the Court.

[(b) After the State Party likely to receive the Court has agreed, the decision [under the preceding paragraph] to hold a session away from the Court's seat shall be taken by the Assembly of the States Parties, which shall be informed either by one of its members, the Presidency, the Prosecutor or the Assembly of the Judges of the Court.]

4. [With the express agreement of the State Party receiving the Court], the privileges, immunities and facilities provided for in _____ shall continue to be effective when the Court holds a session pursuant to paragraph 2.

5. [The provisions of this article shall also apply to non-States Parties which, after inquiries by the Presidency, state that they agree to receive the Court and to grant the privileges, immunities and facilities provided for in _____ _____.]

N.B. Some of the issues raised in the proposals may be dealt with in the Rules of Procedure and Evidence.

Article 63

Trial in presence of the accused

Comment: There appear, in essence, to be three options regarding trials in absentia which have emerged to date, in addition to the ILC draft (A/51/22, vol. II). The ILC text and the proposed options are set out below:

N.B. The ILC text as such could be deleted since it seems to have been superseded by the options that were developed as a consequence of the discussions at the Preparatory Committee.

ILC draft

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4.[1] In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

* * *

[1] The questions addressed in paragraphs 4 and 5 may be better dealt with in the context of the pre-trial proceedings.

Option 1

The trial shall not be held if the accused is not present.[2]

Option 2

General rule

1. As a general rule, the accused shall be present during the trial.

Exceptions

2. In exceptional circumstances, the Trial Chamber may order that the trial proceed in the absence of the accused, if the accused, having been present at the commencement of the trial thereafter:

(a) has escaped from lawful custody or has broken bail; or

[(b) is continuing to disrupt the trial.][3]

Rights of the accused

3. The Trial Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular that the accused is legally represented, if necessary by a lawyer appointed by the Court.[4]

Proceedings to preserve evidence[5]

Subsequent trial[6]

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[2] Option 1 prohibits trial in absentia without any exception; like option 2, it would deal with procedures needed to preserve evidence for trial as a matter separate from trial in absentia.

[3] Some proponents of option 2 do not agree that this should necessarily be a basis for a trial in absentia.

[4] This provision follows paragraph 3 of the ILC draft, except that it omits subparagraph (a), regarding steps to inform the accused of the charges. This is unnecessary under this option since a trial in absentia is permitted only if the accused was present at the commencement of the trial, a stage at which the indictment is to be read out.

[5] There is no separate proposal to preserve evidence for trial. This could be dealt with as part of pre-trial proceedings, and would not necessarily be confined to situations where the accused is absent.

[6] Under this option, there would be no second trial following a trial in absentia.

Option 3

1. As a general rule, the accused should be present during the trial.

2. In exceptional circumstances, the Trial Chamber may, in the interests of justice [at the request of the Prosecutor] [proprio motu or at the request of one of the parties] order that the trial proceed in the absence of the accused, if the latter, having been duly informed of the opening of the trial:

(a) Requests to be excused from appearing for reasons of serious ill-health;

(b) Disrupts the trial;

(c) Does not appear on the day of the hearing;

(d) under detention has, when summoned for the date of the trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court; or

In the event that the accused is convicted following a trial held in his absence, the Trial Chamber may issue a warrant for the arrest and transfer of the accused for the purposes of executing the judgement. The decision taken under the provisions of this paragraph shall be communicated to the accused and may be appealed.

3. The Trial Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. When the accused has not been duly informed of the opening of the trial and when all reasonable steps have been taken to inform the accused of the charges, the Trial Chamber may also, in very exceptional circumstances, [at the request of the Prosecutor] [proprio motu or at the request of one of the parties], order that the trial proceed in the absence of the accused when required in the interests of justice or the interests of the victims.

The accused may not then be represented by a lawyer of the accused's choosing, but the judge presiding over the Trial Chamber may appoint a lawyer on his own motion.

When the accused, having been judged in accordance with the above provisions, is taken prisoner or is arrested, the decisions taken in his absence by the Trial Chamber shall be null and void in all their provisions. The evidence submitted during the trial held in the absence of the accused may not be used, during the second trial, to establish the charges levelled against the accused, except

where it is impossible for the depositions to be made a second time or where the evidence cannot again be produced.

Nevertheless, the accused may agree to the decision if the sentence pronounced in his absence is less than or equal to 10 years of imprisonment.

Option 4

1. The accused shall have the right to be present at the trial, unless the Trial Chamber, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2.[7] The Trial Chamber shall, if it makes an order under (paragraph 2), ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

Article 64

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 58, paragraph 10 (b), and 61 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute and the Rules have been respected;

(d) allow the accused to enter a plea of not guilty or to make an admission of guilt before the Trial Chamber [and should the accused fail to do so, enter a plea of not guilty on his or her behalf].

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

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[7] This is paragraph 3 of the ILC text, which requires consequential adjustments to be harmonized with the text of this Option.

[3. The President of the Trial Chamber shall control and direct the hearing, and decide upon the manner by which evidence shall be produced by the parties. In all circumstances, the President shall have the duty to remain impartial.]

N.B. It was suggested that the beginning of the paragraph should refer to the person presiding over the Trial Chamber.

4. The Trial Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

5. The trial shall be held in public, unless the Trial Chamber determines that certain proceedings be in closed session in accordance with article 68, or for the purpose of protecting confidential or sensitive information which is to be given in evidence. The deliberations of the Court shall remain confidential.

6. The Trial Chamber shall, subject to this Statute and the Rules of Procedure and Evidence, have, inter alia, the power on the application of a party or of its own motion to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(b) exercise the same powers as the Pre-Trial Chamber regarding measures that restrict the liberty of a person;

(c) terminate or modify any warrants issued by the Pre-Trial Chamber;

(d) rule on any preliminary motions.

N.B. See the last paragraph of article 17, paragraph 5 (Challenges to the jurisdiction of the Court or the admissibility of a case) for any possible inconsistency with paragraph 6 (d) and article 81.

(b) require the attendance and testimony of witnesses, and the production of documents and other evidentiary materials by obtaining, if necessary, the assistance of States as provided in this Statute;

[(b) bis order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;]

(c) rule on the admissibility or relevance of evidence;

(d) protect confidential information; and

(e) maintain order in the course of a hearing.

The provisions of article 58, paragraph 10 (f), will apply mutatis mutandis for the purposes of orders sought under subparagraph (d) above.

7. [The Trial Chamber may refer pre-trial issues under this article to the Pre-Trial Chamber for resolution.]

8. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt under article 64, paragraph 1 (d), the Trial Chamber shall determine whether:

(a) the accused understands the nature and consequences of the admission of guilt and whether the admission is voluntarily made after sufficient consultation with defence counsel; and

(b) the admission of guilt is [firmly] supported by the facts of the case that are contained in:

(i) the indictment and in any supplementary materials presented by the Prosecutor, and which the accused admits; and

(ii) any other evidence, including the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall consider the admission of guilt, together with any additional evidence presented and admitted, as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and [may] [shall] convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided by this Statute, and shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, in particular the interests of the victims, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

5. Discussions between the Prosecutor and the defence regarding modification of the charges in the indictment, acceptance of the admission of guilt by the

accused, or the penalty to be imposed shall not be legally binding on the Chamber.[8]

Article 66

Presumption of innocence

Everyone shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt.[9]

Article 67

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled [, in addition to any rights afforded to a suspect under this Statute,] to a public hearing, having regard to [article 64 and] article 68, and to a fair hearing by an independent and impartial tribunal, and to the following minimum guarantees in full equality:[10]

(a) to be informed promptly and in detail, [in a language that the accused understands] [in his own language], of the nature, cause and content of the charge;

(b) to have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the accused's choosing, in confidence;[11]

(c) to be tried without [undue] [unreasonable] delay and to enjoy a speedy trial;

(d) subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the

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[8] Concerns were expressed about this paragraph and it was suggested that its formulation should continue to be examined.

[9] Reservations were expressed regarding the phrases "in accordance with law" and "beyond a reasonable doubt".

[10] A proposal was made that the wording of subparagraphs (a) to (g) of paragraph 3 of article 14 of the International Covenant on Civil and Political Rights should be used as such.

[11] The question of privileged communications could be addressed in the context of article 69.

interests of justice so require, including where the person is unable to secure counsel, and without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution; [In addition the accused shall also be entitled to present any other evidence;]

(f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

[[(h) to make an unsworn statement in his or her defence, if desired] [to declare in his or her defence, but [need] [shall] not take an oath to speak the truth]];

[(i) to request the Pre-Trial Chamber or, after the commencement of the trial, the Trial Chamber to seek the cooperation of a State Party pursuant to Part 9 [7] of this Statute to collect evidence for him/her;]

[(j) no reverse onus or duty of rebuttal shall be imposed on the accused.]

N.B. See also article 68, paragraph 2 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]) for any possible inconsistency with subparagraph 1.

2. [Exculpatory evidence] [Evidence which shows or tends to show the innocence] [or mitigate the guilt] of the accused or may affect the credibility of prosecution evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be [made available] [disclosed] to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide. [The provisions of article 58, paragraph 10 (f), will apply mutatis mutandis for the purposes of a decision made under this subparagraph.]

[3. The right of all persons to be secure in their homes and to secure their papers and effects against entries, searches and seizures shall not be impaired by the Court except upon warrant issued by the [Court] [Pre-Trial Chamber], on the request of the Prosecutor, in accordance with Part 9 or the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the Rules of the Court.]

[4. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, without due process of law.][12]

Article 68

Protection of the [accused], victims and witnesses
[and their participation in the proceedings]

1. The Court shall take the necessary measures available to it to protect the accused, victims and witnesses. Notwithstanding the principle of public hearings, the Court may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means. [In camera hearings are mandatory when they are requested by an accused who was a minor at the time of the commission of the acts or by a victim of sexual violence.]

2. [The Prosecutor shall, in ensuring the effective investigation and prosecution of crimes, respect and take appropriate measures to protect the privacy, physical and psychological well-being, dignity and security of victims and witnesses, having regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, whether the crime involves sexual or gender violence. These measures will be consistent with the rights of the accused.]

N.B. See also article 54, paragraph 4 (e) (Investigation of alleged crimes).

3. The Court shall take such measures as are necessary to ensure the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, at all stages of the process, including, but not limited to, victims and witnesses of sexual and gender violence. However, these measures [may not] [shall not] be [inconsistent with] [prejudicial to] the rights of the accused.

4. [The Court [shall] [may] permit the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected in a manner which is consistent with the rights of the accused and a fair and impartial trial.]

[5. The Victims and Witnesses Unit, established under article 44 of this Statute, shall provide counselling and other assistance to victims and witnesses and advise the Prosecutor and the Court on appropriate measures of protection and other matters affecting their rights. These measures may extend to family members and others at risk on account of testimony given by such witnesses.]

N.B. See article 44, paragraph 4.

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[12] The rights addressed in paragraphs 3 and 4, which are of a general nature, should perhaps be located in another part of the Statute. In addition, paragraph 4 could be reformulated.

[6. Notwithstanding paragraph 1 of article 58, if disclosure of any evidence and/or any of the particulars referred to in that paragraph will probably lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for purposes of these proceedings, withhold such particulars and submit a summary of such evidence. Such a summary shall, for purposes of any later trial proceedings before the Court, be deemed to form part of the particulars of the indictment.]

[7. The rules of procedure shall include provisions giving effect to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.]

[8. Legal representatives of victims of crimes have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.]

N.B. This paragraph should be reviewed in the light of the text on article 73 (Reparations to victims).

9. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

Article 69

Evidence

1. Before testifying, each witness shall, in accordance with [or as excepted by] the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.[13]

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence.[14] These measures shall not be [prejudicial to] [inconsistent with] the rights of the accused.

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[13] Many delegations were of the view that it would be more appropriate to deal with the subject matter of this paragraph in the Rules of Procedure and Evidence.

[14] A proposal was made that the Rules of Procedure and Evidence could permit the use of video or audio technology when the witness is not able to attend the Court due to illness, injury, age or other justifiable reason.

3. The Court has the authority to call all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence in accordance with the Rules of Procedure and Evidence.[15]

5. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.[16]

6. Evidence obtained by means of a violation of this Statute[17] or internationally recognized human rights [or other relevant rules of international law], and which either casts substantial doubt on its reliability or the admission of which is antithetical to and would seriously damage the integrity of the proceedings, shall not be admissible.

7. [With regard to defences open to the accused under the general principles of criminal law in the present Statute, the onus of proof shall be on the accused, subject to a preponderance of probability as applicable in civil cases.][18]

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on [, but may have regard to,] the application of the State's national law.

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[15] A proposal was made, supported by a number of delegations, to add the following paragraph to the Statute: "The Court may decide not to admit evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias." Other delegations supported a proposal that the Statute or Rules of Procedure and Evidence also make reference to the exclusion of evidence of prior sexual conduct of a witness, evidence protected by the lawyer-client privilege, as well as other grounds of exclusion. It was finally proposed that these matters should be addressed in the Rules of Procedure and Evidence, as opposed to in the Statute. Many delegations also felt that the Rules should provide sufficient flexibility to enable the Court to rule on the relevance and admissibility of evidence where no other rule provides guidance on the standards to be applied.

[16] It was questioned whether this provision was strictly necessary.

[17] The question as to whether a violation of the Rules of Procedure and Evidence should also be considered in the context of the application of article 69, paragraph 5, or whether such violation should be addressed by a separate provision in the Statute or Rules of Procedure and Evidence, needs to be determined in the context of the consideration of articles 20 and 52.

[18] Such a provision might better be discussed in the context of articles 66, 67 or 31.

Article 70

Offenses or acts against the integrity of the Court

1. The Court shall have jurisdiction over the following offenses and acts against its integrity when committed intentionally, as defined below:

(a) giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) presenting evidence that the party knows is false or forged;

Option 1

[(c) obstructing or disrupting the conduct of the Court's proceedings by disorderly or offensive conduct;]

[(d) disobeying an order made by or under the authority of the Court in connection with the conduct of its proceedings;]

Option 2

[The Court may, by [fine] or other sanction, punish misbehaviour of persons committed during its proceedings, to the extent provided for in the Rules.]

(e) corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(f) impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(g) retaliating against an official of the Court on account of duties performed by that or another official.

2. The offenses referred to in the present article shall be tried before a Chamber other than the Chamber in which the alleged offenses were committed in accordance with the Rules of Procedure and Evidence.

3. The Court may, in the event of conviction, impose a term of imprisonment not exceeding [X months/years] [or a fine, or both].

N.B. It is not contemplated that all the provisions of the Statute and Rules, whether substantive or procedural, regarding the Court's exercise of jurisdiction over article 5 crimes would apply equally to these offenses. Further work to clarify this issue will be essential. Moreover, similar thought must be given to States parties' obligation to surrender persons charged with these offenses, especially when the State Party is pursuing prosecution itself.

[Article 71

Sensitive national security information

N.B. This title is suggested.

Option 1

1. Any person requested to give information or evidence to the Court may refuse to do so on the ground that they are of a confidential nature and that their disclosure would seriously prejudice the national defence or security interest of the State party concerned.

2. The Court may ask the State party concerned whether it confirms that the disclosure of these information or evidence would seriously prejudice its national defence or security interest.

If the State so confirms, the provision of article 90 (2) (c) and article [...] apply.

Option 2

1. This article applies in any case [falling within the scope of articles [54, paragraph 4 (g),] 58, paragraph 10 (d) and (f), 67, paragraph 2; 68, paragraph 9; 71 and 90, paragraph 2] where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.

2. If, in the opinion of a State, disclosure of documents or information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor or the Defence (as the case may be), to seek to resolve the matter by cooperative means. In appropriate circumstances, this may include the possibility of seeking a determination of the Court as to:

(a) Whether the request might be modified or clarified;

(b) The relevance of the information or documents sought;

(c) Whether there might be agreement on the conditions under which disclosure might be given by providing summaries or redactions, by the use of in camera and/or ex parte proceedings or by means of other protective measures permissible under this Statute or the Rules.

3. Without prejudice to article 54, paragraph 4 (g), the Pre-Trial Chamber or the Trial Chamber shall not make a determination that disclosure should be made except in accordance with the provisions set out below.

4. The Court may hold a hearing for the purposes of hearing the State's representations on non-disclosure. If so, notice to the State will be given in

accordance with the Rules.[19] The Pre-Trial Chamber or Trial Chamber shall, if so requested by the State, hold in camera and ex parte hearings, and may make other special arrangements, including, as appropriate:

- Designating a single judge to examine documents or hear submissions;

- Allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;

- Allowing the State to provide its own interpreters for the hearing and its own translations of sensitive documents; and

- Ordering that no transcripts be made of such proceedings, and that documents not required by the Pre-Trial Chamber or Trial Chamber be returned directly to the State without being deposited or filed in the registry of the Court.

5. The Pre-Trial Chamber or Trial Chamber shall not make a determination to which this article applies unless:

(a) It is clear from the State's actions that it is not acting in good faith towards the Court; and, in determining the State's bona fides, the Pre-Trial Chamber or Trial Chamber shall have regard to the following factors:

(i) Whether efforts have been made to secure the State's assistance through cooperative means and without recourse to measures of compulsion;

(ii) Whether the State has expressly refused to cooperate;

(iii) Whether there is clear evidence that the State does not intend to cooperate either because there has been excessive delay in complying with a request for assistance or because there are other circumstances clearly indicating an absence of good faith on its part;

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[19] The provisions on notice to States might read as follows:

"(a) Subject to subparagraph (b) below, a determination will not be made unless [x days'] notice of the matter has been given to the State concerned and that State has been given an opportunity to make representations to the Court;

(b) If, having regard to all the circumstances, the Pre-Trial Chamber or the Trial Chamber decides that there are substantial reasons for not giving the State notice of the matter, a determination to which this article applies shall not take effect until [x] days after it has been served on that State and the State has been given the opportunity to make representations to the Court."

(b) The information or evidence is relevant to an issue before the Court and is necessary for the efficient and fair conduct of the proceedings; and

(c) Having regard to the State's claim that its national security interests would be prejudiced by disclosure, the Pre-Trial Chamber or the Trial Chamber is satisfied that the claim is manifestly without foundation.

6. Where a State makes a claim falling within paragraph 2 (c) above, it shall submit a reasoned case, orally or in writing, in support of its claim that its national security interests would be so prejudiced.

Option 3

1. Article 90, paragraph 2, option 2, subparagraphs (c) and (d), which now permits a State Party to deny assistance where "execution of the request would seriously prejudice its national security, ordre public or other essential interests" or where "the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence]", would be deleted and replaced by a narrower formulation for subparagraph (c), to read as follows:

Article 90, paragraph 2 (c)

"A State Party may deny a request for assistance, in whole or in part, only if:

"...

"(c) having complied with the provisions of article [see new article below], it determines that there are no conditions under which it can comply with the request, including request for information or evidence arising under article 64, without seriously prejudicing its national security interests."

2. A new article, perhaps following current article 90, would set out procedures to be followed before a State party could deny assistance on national security grounds:

"Article [ ]

"1. If a State Party receives a request for information or evidence from the Prosecutor or the Court, the disclosure of which would, in the opinion of the State, seriously prejudice its national security interests, the State shall without delay notify the Prosecutor or the Court of its concerns and request consultations to determine whether there are means whereby its concerns may be addressed, which may include, among other things, the following:

"(a) modification or clarification of the request;

"(b) a determination by the Pre-Trial or Trial Chamber regarding the relevance of the information or evidence sought;

"(c) obtaining the information or evidence from a different source or in a different form; or

"(d) agreement on conditions under which the assistance could be provided, including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera and/or ex parte proceedings, or other protective measures permissible under the Statute and the Rules.

"2. For purposes of hearing the State's concerns regarding disclosure or facilitating consultations to address those concerns, the Pre-Trial Chamber or Trial Chamber shall, if so requested by the State, hold in camera and/or ex parte hearings, and make other special arrangements, as appropriate.

"3. If, following such consultations, the Prosecutor or Court reaffirms the request for the information or evidence and the State determines there are no means or conditions under which it could provide that information or evidence without serious prejudice to its national security interests, it shall so notify the Prosecutor or the Court of its determination and the specific reasons therefor, unless a specific description of the reasons would itself necessarily result in such a serious prejudice to the State's national security interests.

"4. If a State has complied with the provisions of paragraphs 1 and 3, it may then deny the request for assistance under article 90, paragraph 2 (c).

"5. If the Court is of the view that information or evidence sought from a State is important to the resolution of a critical issue in the case and that the State has manifestly acted in bad faith in denying a request for that information or evidence under article 90, paragraph 2 (c), the Court shall communicate its views to the Assembly of States Parties, and, in an appropriate case, to the Security Council, for such further action as may be necessary and appropriate."]

Article 72

Quorum and judgement

1. A quorum consists of [at least four] [all] members of the Trial Chamber. The judgement shall be given only by judges who have been present at each stage of the trial before the Trial Chamber and throughout its deliberations.

[All of the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations, provided, however, that the trial or deliberation may proceed with four judges, if one, for a good cause, is unable to attend.]

2. The Trial Chamber's judgement shall be based on its evaluation of the evidence and the entire proceedings. The judgement shall not exceed the facts

and circumstances described in the indictment or its amendment, if any.[20] The Court may base its judgement only on evidence submitted and discussed before it at the trial.

3. Option 1

The judges shall attempt to achieve unanimity in their judgement, failing which it shall be taken by a majority of the judges.

Option 2

All judges must concur in a decision as to conviction and at least three judges must concur as to the sentence to be imposed.

4. If the required majority for a decision as to conviction or the sentence to be imposed cannot be reached, the opinion which is more favourable to the accused shall prevail.[21]

5. The deliberations of the Trial Chamber shall remain secret.

6. The judgement shall be in writing and shall contain a full and reasoned statement of the findings on the evidence and conclusions. [It shall be the sole judgement issued.] [It may contain dissenting opinions [, one dissent covering all dissenting opinions].] The judgement or a summary thereof shall be delivered in open court.

[Article 73

Reparations to victims

1. The Court [shall] [may] establish principles relating to reparations to, or in respect of,[22] victims, including restitution, compensation and [compensation for the purposes of] rehabilitation. The Court may, upon request, [or upon its own motion if the interests of justice so require,] determine, in its judgement,

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[20] It was suggested that this sentence could be included in the Rules of Procedure and Evidence.

[21] This paragraph would only be necessary if majority decisions are allowed and a quorum could consist of an even number of judges.

[22] Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victim's families and successors (in French, "ayant-droit"). For the purposes of defining "victims" and "reparations", reference may be made to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17).

the scope and extent of any damage, loss and injury to, or in respect of, victims.

2. In accordance with the principles established by the Court:

(a) The Court may make an order directly against a convicted person for an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.[23] [An award by way of compensation may comprise:

(i) an exemplary element;

(ii) a compensatory element;

(iii) both]

[Where appropriate, the Court may order that the award for reparations be made into the trust fund provided for in article 79];

(b) [The Court may also [make an order] [recommend] that an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, be made by a State]:

[- if the convicted person is unable to do so himself/herself; [and

- if the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]];

(c) [In any case other than those referred to in subparagraph (b), the Court may also recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation].

3. In exercising its power under the present article, the Court may determine whether, in order to give effect to any order it may make, it is necessary to request protective measures under article 90, paragraph 1.[24]

4. Before making a decision under the present article, the Court shall take account of and may invite any written or oral representations from or on behalf

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[23] It was suggested that since, under the present article, the national courts could render a decision with respect to reparations in conflict with an order of the Court, there should, in the interests of legal certainty, be safeguards to prevent any such conflict.

[24] As regards the reference to article 90 and to Part 10 of the Statute in general, the view was expressed that it would be necessary to clarify whether the property and assets referred to in that article includes both crime and non-crime related property and assets.

of the convicted person, victims [, other interested persons] or interested States.

5. Victims or their successors or assigns may seek enforcement of an order [or judgement] under the present article by competent national authorities. In this regard, they may ask the Court to seek enforcement of the orders [or judgement] under [Part 9 and] Part 10 of the Statute. [To that end, States Parties shall take the necessary measures to assist them].

6. Nothing in the present article shall be interpreted as prejudicing the rights of victims [not covered by the judgement of the Court] under national or international law.

7. [Victims or any person acting on their behalf, the convicted person [or any interested State] [or other interested persons] may appeal against judgement under this article, in accordance [with [Part 8 of the Statute and] the Rules].

8. [Rules necessary to give effect to the provisions of the present article shall be made in accordance with article 52].]

N.B. The following provision has been considered by the Preparatory Committee and it was deemed that it would be appropriate for the Rules: "The judgement of the Court under this article will be transmitted by the Registrar to the competent authorities of the State or States with which the convicted person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the convicted person's assets and property or with which the victim has such connection".

Article 74

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to sentence.

2. Except where article 65 applies, the Trial Chamber may on its own motion, and shall at the request of the Prosecutor or the accused, made before the completion of the trial, hold a further hearing to hear any additional evidence or submissions relevant to sentence, in accordance with the Rules.

3. Where paragraph 2 applies, any representations under article 73 shall be heard during the hearing referred to in paragraph 2.

4. The sentence shall be pronounced in public [and in the presence of the accused].[25]

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[25] The bracketed portion of the text requires further consideration in the light of the decision to be taken concerning trials in absentia.

PART 7. PENALTIES

Article 75

Applicable penalties

The Court may impose on a person convicted under this Statute [one or more of the following penalties] [the following penalty]:

(a)[1] [a term of life imprisonment or imprisonment for a specified number of years;]

[a maximum term of imprisonment of [30] years;]

[a definite term of imprisonment between [20] and [40] years [, unless this is reduced according to the provisions of this Statute][2];]

[The Court may attach to the sentence of imprisonment a minimum period during which the convicted person may not be granted any [release under relevant provisions of Part 10 of the Statute].]

[In the case of a convicted person under the age of 18 years at the time of the commission of the crime, a specified term of imprisonment of no more than 20 years];

[When imposing a penalty on a person under the age of 18 years [at the time of the commission of the crime], the Court shall determine the appropriate measures to ensure the rehabilitation of the offender][3]

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[1] To meet the concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, it was suggested that Part 10, article 100, should provide a mandatory mechanism by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

[2] The view was expressed that if such a provision providing for minimum sentencing is included, there should be a reference to factors that may reduce the minimum sentence. In such a case, the list of relevant factors should be exhaustive. It was suggested that among those factors could be the following: (i) diminished mental capacity that falls short of exclusion of criminal responsibility; (ii) the age of the convicted person; (iii) as appropriate, duress; and (iv) the subsequent conduct of the convicted person.

[3] The following proposals were made which should be treated either under age of responsibility or the jurisdiction of the Court:

"[The Court shall have no jurisdiction over those who were under the age of 18 years at the time they are alleged to have committed a crime which would otherwise come within the jurisdiction of the Court]

N.B. The two preceding paragraphs should be harmonized with article 26 (Age of responsibility).

[(b) A fine [in addition to a sentence of imprisonment on conviction of a crime under article 5]];[4]

[(c)

(i) [[disqualification from seeking public office for the person's term of imprisonment and any further period of time that may be imposed] [in the modality and to the extent that the penalty could be imposed in accordance with the laws of the State in which such a penalty is to be enforced];][5]

(ii) a forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct, without prejudice to the rights of bona fide third parties. [When the whole or part of the [instrumentalities of crime or] proceeds, property, assets mentioned in ... cannot be forfeited, a sum of money equivalent thereto may be collected.];[6]]

[(d) Appropriate forms of reparation]

[[without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State][7] [or reparation

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[; however, under exceptional circumstances, the Court may exercise jurisdiction and impose a penalty on a person aged 16 to 18 years, provided it has determined that the person was capable of understanding the unlawfulness of his or her conduct at the time the crime was committed].*

[4] Some delegations held the view that such a provision would give rise to difficult issues of enforcement.

[5] The terms in this provision should be brought into line with similar terms used elsewhere in this Statute once those provisions are finalized.

[6] It was suggested that forfeiture not be included as a penalty, but instead be included as a mechanism which the Court would request States to use with regard to execution of an order for reparations. According to this view, a provision on forfeiture could be considered as a separate paragraph of this article or elsewhere in the Statute.

[7] It was suggested that there was no need for such a clause relating to State responsibility, since it was already dealt with in the context of rules on individual criminal responsibility.

through any other international arrangement], appropriate forms of reparation [, [including] [such as] restitution, compensation and rehabilitation]].[8]

N.B. If retained, subparagraph (d) should be examined in the context of the discussions on article 73 (Reparations to victims).

[(e) (Death penalty)]

Option 1

[death penalty, as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in the light of the gravity of the crime, the number of victims and the severity of the damage.]

Option 2

No provision on death penalty.

[Article 76[9] [10]

Penalties applicable to legal persons

A legal person shall incur one or more of the following penalties:

(i) fines;

[(ii) dissolution;]

[(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]

[(iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]

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[8] A number of delegations suggested that the Statute should address the issue of reparations to victims and their families. Opinions were divided as to whether this issue should be dealt with in the context of penalties. It was suggested that it could usefully be dealt with within the framework of the Working Group on Procedural Matters. It was also noted that the issue of reparations had a bearing on rules of enforcement in Part 10. A number of delegations expressed the view that there mights be merit in dealing with these issues in a unified way focusing on all the issues related to compensation.

[9] Inclusion of a provision on such penalties would depend on the outcome of considerations in the context of individual criminal responsibility for legal persons.

[10] It was suggested that such provisions may give rise to issues of enforcement in the context of Part 10.

[(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;[11]] [and]

[(vi) appropriate forms of reparation.][12]

N.B. Subparagraph (vi) should be examined in the context of reparation to victims.

Article 77

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.[13]

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person had been convicted of more than one crime, the Court shall:

Option 1

[pronounce a single sentence of imprisonment [not exceeding the maximum sentence prescribed for the gravest crime] [, increased by half]]

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[11] See footnote 6 concerning forfeiture for natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

[12] See footnote 6 concerning reparation in the context of natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

[13] It may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the Rules of Procedure and Evidence, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.

Option 2

[indicate whether multiple sentences of imprisonment shall be served consecutively or concurrently.]

[Article 78[14]

Applicable national legal standards

Option 1

In determining the length of a term of imprisonment or the amount of a fine to be imposed, [or property to be forfeited,] the Court [may have regard to the penalties provided for by law of] [shall impose the highest penalty provided for by the law of either]:

(a) [the State of which the convicted person is a national];

(b) [the State where the crime was committed;] [or]

(c) [the State which had custody of and jurisdiction over the accused.]

[In cases where national law does not regulate a specific crime, the Court will apply penalties ascribed to analogous crimes in the same national law.]

Option 2

No provision on national legal standards.][15]

[Article 79[16]

Fines [and assets] collected by the Court

Fines [and assets] collected by the Court may be transferred, by order of the Court, to one or more of the following:

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[14] It was suggested that this issue should be dealt with only in the context of article 20 on applicable national laws. Another suggestion was to move this issue to article 77, paragraph 1. Moreover, the view was held that this kind of provision should be avoided altogether.

[15] Consideration could be given to inserting an express provision to this effect.

[16] It was suggested that there may be options other than (a) and (b) as to the manner in which fines or assets collected by the Court could be distributed to victims.

[(a) [as a matter of priority,] a trust fund [established by the Secretary-General of the United Nations] or [administered by the Court] for the benefit of victims of the crime [and their families];]

[(b) a State the nationals of which were the victims of the crime;]

[(c) the Registrar, to defray the costs of the trial.]]

N.B. This article should be examined in the context of reparations to victims.

PART 8. APPEAL AND REVIEW

Article 80

Appeal against judgement or sentence

1. A [decision] [conviction] under article 72 may be appealed, in accordance with the Rules of Procedure and Evidence, as provided for below:

(a) The Prosecutor may make such an appeal on the following grounds:

(i) procedural error,

(ii) error of fact, or

(iii) error of law;

(b) The convicted person or the Prosecutor on that person's behalf may make such an appeal on the following grounds:

(i) procedural error,

(ii) error of fact,

(iii) error of law, or

(iv) any other ground that affects the fairness or reliability of the proceedings or decision.

[(c) The Prosecutor shall not be entitled to appeal against the conviction but he or she shall be entitled to draw the attention of the Appeals Chamber to a point of law, which in his or her opinion requires interpretation or clarification.]

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of [significant] disproportion between the crime and the sentence;

(b) If on an appeal against sentence, the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 80, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 82.

The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under article 80, paragraph 2 (a).

[3.

Option 1

The Prosecutor or the convicted person may, in accordance with the Rules of Procedure and Evidence, appeal [to the Appeals Chamber] against a decision rendered in absentia under article 63.

Option 2

The Prosecutor or the convicted person may not appeal against a decision rendered in absentia under article 63 except that an appeal against judgement given on the merits in the absence of the accused shall be allowed if the accused accepts the judgement or was represented during the trial before the Trial Chamber by Defence Counsel appointed by the accused.]

4. (1) Unless the Trail Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

When his time in custody exceeds the sentence of imprisonment imposed, he shall be released, but if the Prosecutor is also appealing, his release may be subject to the conditions under (2) below.

(2) In case of an acquittal, the accused shall be released immediately, subject to the following:

(a) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(b) A decision by the Trial Chamber under (a) above may be appealed in accordance with the Rules of Procedure and Evidence.

5. Subject to the provisions of paragraph 4 (1), execution of the judgement shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 81

Appeal against interlocutory decisions[1]

1. Either party may appeal any of the following interlocutory decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

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[1] Further consideration should be given to the question of what decisions could be appealed under this article.

(b) An order granting or denying release of the defendant on bail;

[(c) An order that confirms or denies, wholly or in part, the indictment;]

[(d) An order of exclusion of evidence;]

[(e) When the majority of members of a Trial Chamber shall be of the opinion that the order involves a controlling issue as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the Appeals Chamber, at their discretion, agree to hear the appeal.]

2. An interlocutory appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders upon request in accordance with the rules.

Article 82

Proceedings on appeal[2]

1. For the purposes of proceedings under articles 80 and 82, the Appeals Chamber also has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision, judgement or sentence, or that the decision, judgement or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision, judgement or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine and to report back accordingly, or may itself call evidence to determine the issue. When the decision has been appealed only by the accused, it cannot be amended to his or her detriment.

[Those defences shall be admissible only if already raised in the Trial Chamber or if resulting from the proceedings in that Chamber.]

3. If in an appeal against sentence the Chamber finds that the sentence is [significantly] disproportionate to the crime, it may vary the sentence in accordance with Part 7.[3]

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[2] In Part 10 the question of what constitutes a final decision or judgement will be discussed.

[3] To be revised in conjunction with article 81.

4. The decision of the Chamber shall be taken by a majority of the judges and shall be delivered in open court. [[Six] [Four] judges constitute a quorum.] [The judges shall attempt to achieve unanimity in their judgement, failing which it shall be taken by a majority of the judges.]

The judgement shall state the reasons on which it is based. [If the judgement does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.]

5. The Appeals Chamber may deliver its judgement in the absence of the accused.

Article 83

Revision of conviction or sentence

Option 1 (two-step process)

1. The convicted person or, after death, the person's spouse, [successors or assigns] [children, relatives or any persons having express instructions] [, the State of the person's nationality], or the Prosecutor on the person's behalf, may apply to the [Presidency] [Appeals Chamber] to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that

(i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) is sufficiently important that had it been proven at trial it likely would have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in a conviction or in its confirmation has committed in that case a serious breach of his or her duties;

[(d) The conduct upon which the conviction was based no longer constitutes a crime under the Statute or the sentence being served exceeds the maximum penalty currently provided in the Statute;]

[(e) The Court[, or where applicable, the court of a State Party,] rendered a decision that necessarily also invalidates the judgement in this case.]

[2. The Prosecutor may apply for revision of a final judgement of acquittal on the grounds that, within five years after pronouncement of the final judgement,

new evidence of the kind referred to in paragraph 1 (a) or 1 (b) is discovered [or the acquitted person has confessed guilt with respect to the crime concerned].]

3. The [Presidency] [Appeals Chamber] shall reject the application if it considers it to be unfounded. If it determines that there is a [significant possibility] [probability] that the application is meritorious, it:

[may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) [Refer the matter to the Appeals Chamber][4] [retain jurisdiction over the matter][5]

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.]

[OR

[shall annul the conviction and refer the accused to a Chamber at the same level as, but having composition different from, that of the Chamber that handed down the annulled decision.]

[4. The decision of the Presidency or of a Trial Chamber disposing of the application may be appealed by either party to the Appeals Chamber.]

Option 2 (one-step process)

1. The convicted person or, after death, the person's spouse, [successors or assigns] [children, relatives or any persons having express instructions] [, the State of the person's nationality], or the Prosecutor on the person's behalf, may apply to [the original or, if unavailable or if relief is sought on the basis of paragraph 1 (c), another] [a] Trial Chamber to revise the final judgement of conviction or sentence on the grounds that:

1 (a)-(e) [same as in option 1]

2. [same as in option 1]

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[4] This bracketed text would be used if the Presidency makes the initial review of the application for revision.

[5] This bracketed text would be used if the Appeals Chamber makes the initial review of the application for revision.

3. The Chamber shall hear the parties in the manner set forth in the Rules of Procedure and Evidence. It shall reject the application if it considers it to be unfounded. If it agrees with the application, it may, as appropriate:

(a) Enter a corrected judgement;

(b) Order a new trial; or

(c) Refer the matter to the Appeals Chamber.

[4. The decision of the Trial Chamber disposing of the application may be appealed by either party to the Appeals Chamber.]

[Article 84

Compensation to a suspect/accused/convicted person

1. Anyone who has been subject to arrest or detention in violation of the Statute, [the Rules] or internationally recognized human rights law shall have a right to compensation from the Court, in accordance with the Rules.

2. When a person has, by a final decision, been convicted of a criminal offence, and when subsequently his or her conviction has been reversed, or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated in accordance with the Rules, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

[3. The Court may also award compensation to a person who was held in detention, based on the prejudice caused to him by such detention, when the proceedings against him have concluded with a decision to release him because of insufficient charges against him or because of a final decision of acquittal.]]

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE[1]

N.B. Consideration should be given to interchanging parts 9 and 10.

Article 85

General obligation to cooperate

States Parties shall, in accordance with the provisions of this [Part] [Statute], fully cooperate with the Court[2] in its investigation and prosecution of crimes under this Statute. States Parties shall so cooperate without [undue] delay.

Article 86[3]

[Requests for cooperation: general provisions]

1. Authorities competent to make and receive requests/Channels for communication of requests

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State

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[1] Articles 86, 88, 89 and 90 contain virtually identical provisions, some of which should be harmonized.

[2] "Court" throughout this Part is understood to include its constituent organs, including the Prosecutor, as defined in article 35. Such a provision could be inserted elsewhere in the Statute.

N.B. See N.B. on article 35 (Organs of the Court).

[3] It was suggested that the provisions of article 88, paragraph 4, and article 90, paragraph 8, concerning the protection of witnesses and victims should be combined in a single paragraph in article 86, which would read:

> "The Court may withhold, in accordance with article 68, from the requested State [or a State making a request to the Court under article 90, paragraph 7], specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available to a State under this part shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses or their families."

It was also suggested that the content of such a provision should be considered further.

Party upon ratification, accession or approval. Such designation and subsequent changes shall be done in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of paragraph 1 (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Language of requests[4]

Requests for cooperation [and supporting documents] shall be [either] in [an official language of the requested State [unless otherwise agreed]] [or in] [one of the working languages reflected in article 51, in accordance with the choice made by that State upon ratification, accession or approval].

[The legal effect of such request shall not be diminished if any supporting document is not in such working language provided that a brief summary of any such document in that working language is also submitted.]

3. Confidentiality of requests from the Court

The requested State shall keep confidential a request and any supporting documents, except to the extent that the disclosure is necessary for execution of the request.

4. Cooperation by non-States Parties[5]

[(a) The Court may [call on] [invite] any State not party to this Statute to provide assistance under this part on the basis of [comity,] an ad hoc arrangement, an agreement with such State [or any other appropriate basis].]

[(b) Where a State not party to this Statute [which has entered into an ad hoc arrangement or an agreement with the Court],[6] fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the General Assembly of States Parties][7] [or] [the United Nations General Assembly] [or, where the Security Council referred the matter to the

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[4] The language to be used by States in their replies to the Court is dealt with under article 91.

[5] It was suggested that the issue of non-States Parties should be addressed in a separate article 85.

[6] It was suggested that a reference to paragraph (a) would cover this concern.

[7] It was suggested that the referral be made to a standing committee of the General Assembly of States Parties. This issue needs to be further addressed in Part 4.

Court,] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction].[8]]

5. Cooperation of intergovernmental organizations

The Court may ask any intergovernmental organizations to provide information or documents. The Court may also ask for other forms of cooperation and assistance as may be agreed upon with such organizations and in accordance with their respective competencies and/or mandates.

6.[9] States Parties' failure to cooperate [comply]

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the Assembly of States Parties][10] [or] [the General Assembly of the United Nations] [or, where the Security Council referred the matter to the Court] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction].[11]

N.B. In view of the length of the article, the headings of the paragraphs are retained pending a decision on the text of the article. Consideration may be given to dividing the article into three as follows:

- **paragraphs 1 to 3;**
- **paragraphs 4 and 5;**
- **paragraph 6.**

Article 87

[Surrender] [Transfer] [Extradition] of persons[12] to the Court

1. The Court may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in

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[8] The question of "necessary measures" has to be further examined.

[9] It was suggested that this paragraph should be inserted in article 85.

[10] It was suggested that the referral be made to a standing committee of the Council of States Parties. This issue needs to be further addressed in the organization of the Court.

[11] The question of "necessary measures" has to be further examined.

[12] The term "persons" is understood to include "suspects", "accused" and "convicted persons". [The term "suspect" means a person who is the subject of a pre-indictment arrest warrant.]

article 88, to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part [and the procedure under their national law], comply with requests for arrest and [surrender] [transfer] [extradition] without [undue] delay.

[2. The national law of a requested State shall govern the [conditions] [procedure] for granting or denying a request for [surrender] [transfer] [extradition] [except as otherwise provided in this Part].]

3.

[Option 1: No grounds for refusal.]

[Option 2: A State Party may deny a request for [surrender] [transfer] [extradition] only if:[13]

(a) with respect to a crime under [article 5 (b) through (e)] [article 5 (e)], it has not accepted the jurisdiction of the Court;

[(b) the person is a national of the requested State;][14]

(c) the person has been investigated or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his [surrender] [transfer] [extradition] is sought [, except that a request may not be denied if the Court has determined that the case is admissible under article 15];

[(d) the information submitted in support of the request does not meet the minimum evidentiary requirements of the requested State, as set forth in article 88, paragraph 1 (c);]

(e) compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State.][15]

N.B. The options in this subparagraph are not clear.

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[13] There is no agreement on the list of grounds contained in this option.

[14] It was suggested that even if a person is a national of the requested State, this does not prevent that State from [transferring] [surrendering] [extraditing] the person to the Court if the latter guarantees that the national in question shall be returned to the requested State to serve the sentence pronounced by the Court (cf. article 94, paragraph 1).

[15] It was suggested that the following ground for refusal should be included: when the imposition or the execution of punishment for the offence for which surrender is requested would be barred by reasons prescribed under the law of the requested State if the requested State were to have jurisdiction over the offence.

[4. If a request for [surrender] [transfer] [extradition] is denied, the requested State Party shall promptly inform the Court of the reasons for such denial.]

5. Application to the Court to set aside [surrender] [transfer] [extradition]

A State Party [having received a request under paragraph 1 may, in accordance with the Rules of Procedure and Evidence[16]] [may, in [...] days of receiving a request under paragraph 1], file a written application with the Court to [set aside] [withdraw] the request on specified grounds [including those mentioned in articles 15 and 18]. Pending a decision of the Court on the application, the State concerned may delay complying with the request but shall take appropriate measures [as may be available] to ensure the compliance with the request after a decision of the Court to reject the application.

6. Parallel requests from the Court and State(s)

Option 1

(a) A State Party [which has accepted the jurisdiction of the Court] [, if it is a party to the treaty covered by [article 5, paragraph (e),] with respect to the crime,] shall [, as far as possible,] give priority to a request from the Court under paragraph 1 over requests for extradition from other States [Parties].

(b) If the requested State also receives a request from a non-State Party to which it is bound by an extradition agreement for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

(i) the respective dates of the requests;

(ii) if the offences are different, the nature and gravity of the offences;

(iii) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(iv) the possibility of subsequent [surrender] [transfer] [extradition] or extradition between the Court and the State requesting extradition.

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[16] Questions dealing with the consequences of lapse of time will be addressed in the Rules of Procedure and Evidence.

Option 2

(a) If the requested State also receives a request from a [State] [State Party] [to which it is bound by an extradition agreement] for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the appropriate authority of the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

(i) whether the extradition request was made pursuant to a treaty;

(ii) the respective dates of the requests;

(iii) if the offences are different, the nature and gravity of the offences;

(iv) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(v) the possibility of subsequent [surrender] [transfer] or extradition between the Court and the State requesting extradition.

(b) The requested State may not, however, deny a request for the [surrender] [transfer] [extradition] made under this article in deference to another State's request for extradition of the same person for the same offence if the State requesting extradition is a State Party and the Court has ruled the case before it is admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.

Option 3

(a) Subject to paragraph (b), a State Party [shall] [may] accord priority to a request by a State over a request by the Court for the extradition, transfer or surrender of a person to the requesting State under the provisions of any existing bilateral or multilateral agreement.

(b) A State Party shall however accord priority to requests from the Court over a request by a State where the Court has [positively] determined pursuant to article 15 that the requesting State is unwilling or unable genuinely to carry out the investigation or prosecution of the case for which extradition, transfer or surrender is sought.

[7. Proceeding in requested State

Where the law of the requested State so requires, the person whose [surrender] [transfer] [extradition] is sought shall be entitled to challenge the request for arrest and [surrender] [transfer] [extradition] in the court of the requested State on [only] the following grounds:

[(a) lack of jurisdiction of the Court;]

[(b) non bis in idem; or]

[(c) the evidence submitted in support of the request does not meet the evidentiary requirements of the requested State as set forth in article 88, paragraph 1 (b) (v) and (c) (ii).]]

8. Delayed or temporary [surrender] [transfer] [extradition]

If the person sought is being proceeded against or is serving a sentence in the requested State for an offence different from that for which [surrender] [transfer] [extradition] to the Court is sought, the requested State, after making its decision to grant the request, may:

(a) temporarily [surrender] [transfer] [extradite] the person to the Court and in that case, the Court shall return the person to that State after the completion of the trial or as otherwise agreed; or

(b) [with the consent of the [Court] [Pre-Trial Chamber] which shall rule after having heard the Prosecutor] postpone the [surrender] [transfer] [extradition] of the person until the completion or abandonment of the prosecution [or completion of service of the sentence].[17]

[9. Extradite or prosecute obligation[18]

(a) In the case of a crime to which article 5, paragraph (e), applies, the requested State [, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime,] shall, where it decides not to [surrender] [transfer] [extradite] the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case [through proceedings in accordance with national laws] to its competent authorities for the purpose of prosecution.

[(b) In any other case, the requested State Party shall [consider whether it can], in accordance with its legal procedures, take steps to arrest and [surrender] [transfer] [extradite] the accused to the Court, or [whether it should take steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case to its competent authorities for the purpose of prosecution.]

[(c) The [surrender] [transfer] [extradition] of an accused to the Court will constitute, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or that the case be referred to

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[17] If it is agreed that consent of the Court will be required for postponement, then the last set of brackets can be removed.

[18] The text of paragraph 9 (a) and (b) applies if there is a consent regime. If the Court has jurisdiction over core crimes and there is no consent regime, these provisions could be deleted.

the competent authorities of the requested State for the purpose of prosecution.]]

[10. Provision of evidence irrespective of [surrender] [transfer] [extradition]

[To the extent permitted under the law of the requested State and] without prejudice to the rights of third parties, all items found in the requested State [that have been acquired as a result of the alleged crime or] that may be required as evidence shall, upon request, be transmitted to the Court [if the [surrender] [transfer] [extradition] is granted on conditions to be determined by the Court] [even if the [surrender] [transfer] [extradition] of the person cannot be carried out]. [Any rights which third parties may have acquired in the said items shall be preserved where these rights exist. The property shall be returned without charge to the requested State as soon as possible after the trial.]]

N.B.

- **It would be more appropriate to deal with the issues raised in this paragraph in the context of article 90 (Other forms of cooperation [and judicial and legal [mutual] assistance]).**

- **Consideration may be given to dealing with some of the details in this paragraph in the Rules of Procedure and Evidence.**

11. Transit of [surrendered] [transferred] [extradited] person[19]

(a) A State Party shall authorize transportation under its national procedural law through its territory of a person being [surrendered] [transferred] [extradited] to the Court by another State. A request by the Court for transit shall be transmitted in accordance with article 86. The request for transit shall contain a description of the person being transported, a brief statement of the facts of the case and the legal characterization and the warrant for arrest and [transfer] [surrender] [extradition]. A person in transit shall be detained in custody during the period of transit.

[(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.]

(c) If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

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[19] It has been suggested that this or other provisions could form the basis for a separate article. In addition, some felt that a number of details set forth in this text would be more appropriately regulated in the Rules of Procedure and Evidence.

12. Costs

The costs associated with the [surrender] [transfer] [extradition] of a person shall be borne by the [Court] [requested State] [Court or the requested State depending upon where the cost concerned arises].

N.B. In view of the length of the article, the headings of the paragraphs are retained. Consideration may be given to dividing the article into shorter articles, without prejudice to their retention, as follows:

- **paragraphs 1 and 2;**
- **paragraphs 3 and 4;**
- **paragraph 5;**
- **paragraph 6;**
- **paragraph 7;**
- **paragraph 8;**
- **paragraph 9;**
- **paragraph 10;**
- **paragraph 11;**
- **paragraph 12.**

Article 88

Contents of request for [surrender] [transfer] [extradition][20]

1. A request for arrest and [surrender] [transfer] [extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record,[21] provided that a request shall be confirmed [if necessary] through the channel provided for in article 86. The request shall contain or be supported by:

(a) information describing the person sought, sufficient to identify the person and information as to that person's probable location;

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[20] Portions of this article might also be provided for in the Rules of Procedure and Evidence rather than in the Statute.

[21] Issues relating to the security of this type of transmission will have to be discussed.

(b) in the case of a request for pre-indictment arrest and [surrender] [transfer] [extradition]:

(i) a copy of warrant for arrest;[22]

(ii) a statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to seek an indictment within [90] days;

(iii) a brief summary of the [essential] facts of the case;

(iv) a statement as to why pre-indictment arrest is urgent and necessary;[23]

(v) [such documents, statements, or other types of information regarding the commission of the offence and the person's role therein, which may be required by the laws of the requested State;] [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties with other States;]

(c) in the case of a request for post-indictment arrest and [surrender] [transfer] [extradition]:

(i) a copy of the warrant of arrest and indictment;

[(ii) such documents, statements, or other types of information regarding the commission of the offence and the accused's role therein which may be required by the laws of the requested State; [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties or other arrangements with other States];]

(d) in the case of a request for the arrest and [surrender] [transfer] [extradition] of a person already convicted:[24]

(i) a copy of any warrant of arrest for that person;

(ii) a copy of the judgement of conviction;

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[22] The question of authentication of a warrant of arrest will be dealt with in the Rules of Procedure and Evidence.

[23] Article 59 covers pre-indictment arrest, while this paragraph also addresses the form of a request for pre-indictment arrest. The text of these two provisions must be examined together to ensure that there are no inconsistencies or duplications.

[24] It was suggested that this paragraph is an enforcement-of-sentence issue to be treated in Part 10.

(iii) information to demonstrate that the person sought is the one referred to in the judgement of conviction;

(iv) [if the person sought has been sentenced,] a copy of the sentence imposed and a statement of any time already served and that remaining.

2. A State Party shall notify the Court at the time of ratification, accession or approval whether it can [surrender] [transfer] [extradite] on the basis of a pre-indictment warrant and the information specified in paragraph 1 (b) or it can only [surrender] [transfer] [extradite] following [confirmation of indictment] [issuance of a post-indictment warrant] on the basis of the information in paragraph 1 (c).

[3. Where the requested State Party considers the information provided insufficient to allow it to comply with the request, it shall seek, without delay, additional information and may fix a reasonable time limit for the receipt thereof. [Any proceedings in the requested State may be continued, and the person sought may be detained, for such period as may be necessary to enable the Court to provide the additional information requested.] If the additional information is not provided within the reasonable time limit fixed by the requested State, the person may be released.]

[4. The Court may in accordance with article 68 withhold from the requested State specific information about any victims, potential witnesses and their families if it considers that it is necessary to ensure their safety or physical or psychological well-being. Any information that is made available under this article shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.][25]

N.B. This provision is similar to the text in articles 89, paragraph 3, (Provisional arrest) and 90, paragraph 8 (b) (Other forms of cooperation [and judicial and legal [mutual] assistance]). Consideration may be given to combining them in a single article.

Article 89

Provisional arrest[26]

1. In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for [surrender] [transfer] [extradition] and supporting documents under article 88.

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[25] This paragraph could also be included under article 86.

[26] ILC article 52 (1) (a) addresses provisional arrest, as well as search and seizure and other measures pertaining to mutual assistance. In order to present all proposals in a clear fashion, the present document treats provisional arrest in this article and the other matters in article 90.

2. The request for provisional arrest shall [be made by any medium capable of delivering a written record and shall] contain:

(i) a description of the person sought and information regarding the probable location of such person;

(ii) a brief statement of the essential facts of the case, including, if possible, the time and location of the offence;

(iii) a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and, if applicable, a description of the specific offence or offences with which the person has been charged or for which he has been convicted; and

(iv) a statement that a request for [surrender] [transfer] [extradition] of the person sought will follow.

3. The Court may withhold from the requested State specific information about any victims, potential witnesses and their families or close associates if it considers that it is necessary to ensure their safety or well-being. Any information that is provided under this article to the requested State shall be provided in a manner that protects the safety or well-being of any victims, potential witnesses and their families or close associates.

N.B. See the N.B. in article 88, paragraph 4 (Contents of request for [surrender] [transfer] [extradition]).

4. A person who is provisionally arrested may be discharged from custody upon the expiration of [ ][27] days from the date of provisional arrest if the requested State has not received the request for [surrender] [transfer] [extradition] and the supporting documents specified under article 88. However, the person may consent to [surrender] [transfer] [extradition] before the expiration of this period if the legislation of the requested State allows, in which case that State shall proceed to [surrender] [transfer] [extradite] the person to the Court as soon as possible.[28]

5. The fact that the person sought has been discharged from custody pursuant to paragraph 4 shall not prejudice the subsequent rearrest and [surrender] [transfer] [extradition] of that person if the request for [surrender] [transfer] [extradition] and supporting documents are delivered at a later date.

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[27] Some delegations have proposed a 30-day period, some a 40-day period and some a 60-day time period.

[28] It was suggested that the simplified surrender procedure should be the object of a separate paragraph, since it applies to both the provisional arrest stage and after a full surrender request has been submitted.

This paragraph could also be included in article 86.

Article 90

Other forms of cooperation [and judicial and legal [mutual] assistance][29]

1. States Parties shall, in accordance with the provisions of this Part [and their national [procedural] law], comply with requests for assistance by the Court for:

(a) the identification and whereabouts of persons or the location of items;

(b) the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;

(c) the questioning of any suspect or accused;

(d) the service of documents, including judicial documents;

(e) facilitating the appearance of persons before the Court;

[(f) the temporary transfer of persons in custody, with their consent [which cannot be withdrawn], in order to provide testimony [or other assistance] to the Court;]

[(g) the conduct of on-site investigations and inspections[30] [with the consent of the requested State];]

[(h) the conduct of proceedings of the Court in its territory with the consent of the requested State;][31]

(i) the execution of searches and seizures;

(j) the provision of records and documents, including official records and documents;

(k) the protection of victims and witnesses and the integrity of evidence;

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[29] This issue has to be revisited after the title of Part 9 is confirmed.

[30] This issue is also addressed in article 54, paragraph 4 (c).

[31] The relationship between subparagraphs (g) and (h) and article 91, paragraph 4, needs to be examined.

(l) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture without prejudice to the rights of bona fide third parties;[32] and

(m) any other types of assistance [not prohibited by the law of the requested State].

[2. Grounds for refusal

Option 1

A State Party shall not deny a request for assistance from the Court.

Option 2

A State Party may deny a request for assistance, in whole or in part, only if:[33]

(a) with respect to a crime [under [article 5, paragraphs (b) through (e)] [article 5, paragraph (e)], it has not accepted the jurisdiction of the Court;

(b) the authorities of the requested State would be prohibited by its national laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State;

(c) execution of the request would seriously prejudice its national security, ordre public or other essential interests;

(d) the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence];

(e) execution of the request would interfere with an ongoing investigation or prosecution in the requested State or in another State [or with a completed investigation or prosecution that might have led to an acquittal or conviction, except that a request may not be denied if the investigation or prosecution relates to the same matter which is the subject of the request and the Court has determined that the case is admissible under article 15];

(f) compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party].]

[3. Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an

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[32] The issue of whether the Court is to be vested with such powers is linked with article 75 in Part 7 on Penalties.

[33] The list of possible grounds for refusal is not an agreed list.

alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.]

4. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

[5. If a requested State does not produce a document or disclose evidence under paragraph 2 (d) on the ground that it relates to its national defence, the Trial Chamber shall only make such inferences that relate to the guilt or innocence of the accused.]

N.B. See article 71.

6. Confidentiality[34]

(a) The Court shall ensure the confidentiality of documents and information except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 of the Statute and related Rules of Procedure and Evidence.

7. Assistance by the Court

(a) The Court [may] [shall], upon request, cooperate with and provide assistance [within its competence] to a State Party conducting an investigation into or trial in respect of acts which constitute a crime under this Statute [or which constitute a serious crime under the national law of the requesting State].

(b)[35]

(i) The assistance provided under subparagraph (a) shall include, among others:

(1) the transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

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[34] Views have also been expressed that subparagraphs (b) and (c) should be addressed in the Rules of Procedure and Evidence.

[35] Views have been expressed that this subparagraph should be addressed in the Rules of Procedure and Evidence.

(2) the questioning of any person detained by the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

(1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;[36]

(2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68[37] [and shall require the consent of that witness or expert];

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a non-State party.

8. Form and contents of the request

(a) Requests for [judicial and legal] [mutual] assistance shall:

(i) be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that it shall be confirmed [, if necessary,] through the channel provided for in article 86; and

(ii) contain the following, as applicable:

(1) a brief statement of the purpose of the request and the assistance sought, including the legal basis and grounds for the request;

(2) as much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(3) a brief description of the essential facts underlying the request;

(4) the reasons for and details of any procedure or requirement to be followed;

[(5) such information as may be required under the law of the requested State in order to execute the request;]

(6) any other information relevant to the assistance being sought.

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[36] The relationship with article 92 needs to be considered.

[37] This relates to the provisions on the protection of victims and witnesses.

(b) The Court may withhold, in accordance with article 68, from the requested State [or a State making a request under paragraph 6] specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available under this article to the requested State shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.

N.B. See the N.B. in article 88, paragraph 4 (Contents of request for [surrender] [transfer] [extradition]).

N.B. Consideration may be given to dividing this article into shorter articles, without prejudice to their retention, as follows:

- **paragraph 1;**
- **paragraphs 2 to 5;**
- **paragraph 6;**
- **paragraph 7;**
- **paragraph 8.**

Article 91

Execution of requests under article 90

1. Requests for assistance shall be executed in accordance with the law of the requested State [and, unless prohibited by such law, in the manner specified in the request, including following any procedures outlined therein or permitting persons specified in the request to be present at and assist in the execution process[38] [by its competent authorities]].

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.[39]

3. Replies from States Parties, including any accompanying documents, [may be in the language of the requested State] [shall be in accordance with paragraph 2 of article 86. The Court may also request the transmission of documents in their original language].

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[38] There is a link between this provision and the empowerment provisions of paragraph 4.

[39] Views have been expressed that this should be addressed in the Rules of Procedure and Evidence.

[4. The [Prosecutor] [Court] may [, if requested,] assist the authorities of the requested State with the execution of the request for judicial assistance [and may, with the consent of the requested State, carry out certain inquiries on its territory].][40]

[5. [For the purposes of paragraph 4,] the requested State shall, upon request, inform the Court of the time and place of execution of the request for assistance.][41]

6. (a) The ordinary costs for execution of requests in the territory of the requested State shall be borne by the requested State except for the following which should be borne by the Court:

(i) Costs associated with the travel and security of witnesses and experts or the transfer of persons in custody;

(ii) Costs of translation, interpretation and transcription;

(iii) The travel and subsistence costs of the Prosecutor, members of his office or any other member of the Court; and

(iv) The costs of any expert opinion or report requested by the Court.

(b) Where the execution of a request will result in extraordinary costs, [there shall be consultations to determine how those costs will be met] [those costs shall be met by the Court].

(c) The provisions in this paragraph shall apply with appropriate modifications to requests made to the Court for assistance.[42]

N.B.

- Consideration may be given to whether this provision should constitute a separate article where all the provisions dealing with costs would be combined. See also article 87, paragraph 12 ([Surrender] [Transfer] [Extradition] of persons to the Court).

- Consideration may also be given to dealing with some of the details relating to the costs in the Rules of Procedure and Evidence.

[7. (a) Witnesses or experts may not be compelled to testify at the seat of the Court.

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[40] Views have been expressed that paragraph 1 is an alternative to this paragraph.

[41] Views have been expressed that this should be addressed in the Rules.

[42] Similar provisions may have to be inserted elsewhere to address the situation where the Court renders assistance to States or States Parties.

[(b) If they do not wish to travel to the seat of the Court, their evidence shall be taken in the country in which they reside or in such other place as they may agree upon with the Court [in accordance with national requirements [and in compliance with international law standards][43]].

(c) In order to guarantee the safety of witnesses and experts, any means of communication may be used to take their evidence while preserving their anonymity.[44]][45]

[(d) No witness or expert who appears before the Court may be prosecuted, detained or submitted to any restriction of personal freedom by the Court in respect of any acts [or omissions] that preceded the departure of that person from the requested State.]

8. Provisions allowing a person heard or examined by the Court under article [...] to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security also apply to the execution of requests for assistance under this article.

[Article 92

Rule of speciality

1. Limit on other proceedings against [surrendered] [transferred] [extradited] person

A person [surrendered] [transferred] [extradited] to the Court under this Statute shall not be:

(a) proceeded against, punished or detained for any criminal act other than that for which the person has been [surrendered] [transferred] [extradited];

(b) [surrendered] [transferred] [extradited] to another State in respect of any criminal act[46]

[except when he or she commits the criminal act after [extradition] [surrender] [transfer]].

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[43] The exact formulation will depend on the formulation adopted for article 69.

[44] The protection of witnesses is also addressed in articles 54 and 68.

[45] Views have been expressed on the relationship between subparagraphs (b) and (c) and article 63 on trial in the presence of the accused.

[46] The issue of transfer, etc., from the State of enforcement of a sentence of imprisonment to a third State is addressed in article 97.

2. Limit on other uses of evidence

Evidence provided by a State Party under this Statute shall [, if that State Party so requests,] not be used as evidence for any purpose other than that for which it was provided [unless this is necessary to preserve a right of the accused under article 67, paragraph 2].

3. Waiver of rule by the requested State

The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. In the case of paragraph 1, this request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence.][47]

N.B. The headings of the paragraphs are retained pending a decision on the text of the article.

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[47] These square brackets reflect the view that there should be no rule of speciality in the Statute.

PART 10. ENFORCEMENT[1]

Article 93

General obligation regarding recognition [and enforcement] of judgements

States Parties [shall] [undertake to recognize] [[and to] enforce directly on their territory] [give effect to] the judgements of the Court [, in accordance with the provisions of this part].

[The judgements of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted and other forms of reparation ordered by the Court, such as restitution, compensation and rehabilitation.][2]

N.B. This article should also be considered in the context of the discussions on article 73 (Reparations to victims).

Article 94

Role of States in enforcement [and supervision] of sentences of imprisonment

[1]1.

Option 1

A sentence of imprisonment shall be served in a State designated by the [Court] [Presidency].

Option 2

(a) A sentence of imprisonment shall be served in a State designated by the [Court] [Presidency] from a list of States which have indicated to the Court

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[1] One delegation was of the view that this part deals with issues also relevant to judicial assistance and that there might be grounds for non-recognition or non-enforcement of judgements.

[2] There was a question whether this sort of provision should be in article 72, Part 7 or in Part 10.

[3] The issue arises as to whether provision should be made concerning whether non-States Parties should accept sentenced persons for imprisonment.

their willingness to accept sentenced persons. The State so designated shall promptly inform the [Court] [Presidency] whether it accepts the request.

(b)[4] A State may make its consent conditional. [When a State makes its consent conditional, on the applicability of its domestic laws relating to pardon, conditional release and commutation of sentence, and on its administration of the sentence, the consent of the Court is not required to subsequent actions by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment].

2.

(a) The [Court's] [Presidency's] designation of a State under paragraph 1 shall be governed by principles of [equitable distribution] [burden sharing] to be elaborated [in the Rules.] [However, no such designation shall be made with respect to the State where or against which the crime was committed or the State of which the convicted person or the victim is a national [, unless the [Court] [Presidency] explicitly decides otherwise for reasons of social rehabilitation].]

(b) In making a designation under paragraph 1, the [Court] [Presidency] shall allow the person sentenced to provide views on any concerns as to personal security or rehabilitation. However, the consent of the person is not required for the [Court] [Presidency] to designate a particular State for enforcement of the sentence.

[(c) In making a designation under paragraph 1, the [Court] [Presidency] shall take into account reasonable compliance with international standards governing treatment of prisoners.]

3.

If no State is designated under paragraph 1, the sentence of imprisonment shall be served in the prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2.

Article 95

Enforcement of the sentence

1. [Subject to conditions it may have specified in paragraph (b) of option 2 of article 94,][5] the sentence of imprisonment shall be binding on the States Parties, which may in no case modify it.

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[4] If retained, this provision will need to conform with provisions of article 100.

[5] The text in square brackets will be retained in the event option 2 of article 94 is adopted.

2. The Court alone shall have the right to decide any application for review of the judgement or sentence. The State of enforcement shall not impede the sentenced person from making any such application.

Article 96

Supervision and administration of sentence

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency] [, and consistent with internationally recognized standards governing treatment of prisoners.]

2.

Option 1

The conditions of detention shall be governed by the law of the State of enforcement and consistent with internationally recognized standards governing treatment of prisoners. [However, the [Court] [Presidency] may, on its own motion or at the request of the sentenced person, modify the conditions of detention of the sentenced person. The State of enforcement shall enforce the modified conditions of detention. The [Court] [Presidency] may also on its own motion, or at the request of the sentenced person or the State of enforcement, decide that the sentenced person be transferred to another State for the continued serving of the sentence [provided that State agrees].

Option 2

The conditions of detention shall be governed by the law of the State of enforcement, consistent with internationally recognized minimum standards, but in any case not more or less favourable than those available to prisoners convicted of similar offenses in the State of enforcement.

3. Communications between persons sentenced and the Court shall be unimpeded [and confidential].

Article 97

Transfer of the person upon completion of sentence

1. Unless the State of enforcement agrees to permit the prisoner to remain in its territory following completion of sentence, the prisoner shall be released into the custody of the State of the person's nationality or another State that has agreed to receive the person.

2. The costs involved in transporting the prisoner to another State under article 94 shall be borne by the Court, unless the State of enforcement or the receiving State agree otherwise.

3. [Unless prohibited by the provisions of article 92] [with the consent of the Court as provided in article 98],[6] the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the prisoner to the State which has requested the extradition or surrender of the prisoner for purposes of trial or enforcement of a sentence.

[Article 98

Limitation of prosecution/punishment for other offences[7]

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or punishment [or extradition to a third State] for any conduct committed prior to delivery to the State of detention, unless such prosecution or punishment [or extradition] has been approved by the [Court] [Presidency] [at the request of the State of detention].

2. The [Court] [Presidency] shall rule on the matter after having heard the prisoner.

3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days on the territory of the State of enforcement after having served the full sentence imposed by the Court.]

[Article 99

Enforcement of fines and forfeiture measures

1. States Parties shall [, in accordance with their national law,] enforce fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]][8] as fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]] rendered by their national authorities.

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[6] There is a question as to whether the permissibility of re-extradition of the prisoner should be addressed in article 92 (Rule of speciality) or in article 98.

[7] Consideration should be given to the relationship of this article to the rule of speciality, as found in article 92. This article is also related to article 87, paragraph 8, regarding temporary or delayed surrender.

[8] References to fines, forfeiture, restitution or compensation, or similar terms, will depend on the range of sanctions and compensatory measures ultimately provided for in Part 7 [article 76].

N.B. This footnote should be reviewed in the context of the discussions on article 73 (Reparations to victims)

[For the purpose of enforcement of fines, the [Court] [Presidency] may order the forced sale of any property of the person sentenced which is on the territory of a State Party. For the same purposes, the [Court] [Presidency] may order the forfeiture of proceeds, property and assets and instrumentalities of crimes belonging to the person sentenced.][9] [10]

[Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws.

[The provisions of this article shall apply to legal persons.]]

2. Property, including the proceeds of the sale thereof, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be handed over to the [Court] [Presidency] [which will dispose of that property in accordance with the provisions of article 79 [paragraph 5 of article 54].]

Article 100[11]

Pardon,[12] parole and commutation of sentences [early release]

Option 1

1. The prisoner may apply to the [Court] [Presidency] for a [decision on] [ruling regarding the appropriateness of] [pardon,] parole or commutation of sentence, if under a generally applicable law of the State of enforcement, a

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[9] There is a question whether this provision concerns enforcement of sentences, or rather the powers of the Court to order particular measures relating to enforcement of fines or confiscation. If it is meant to refer to States enforcing specific orders relating to fines or confiscation, then paragraph 1 might be amended to make clear that that enforcement by States Parties would include "giving effect to orders of the Court relating to enforcement of fines or forfeitures, such as the seizure of particular property or the forced sale of property of the convicted person to satisfy a fine".

[10] There was a suggestion that this paragraph should be placed first.

[11] In the discussion on penalties in the Preparatory Committee, it was suggested that, to meet concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, article 100 should provide a mandatory mechanism by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

[12] A concern was expressed that pardon might involve political considerations which would not be appropriate for determination by the Court, so that the authority to decide on an application for pardon might better be vested in the Assembly of States Parties.

person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for [pardon,] parole or commutation of sentence.

Option 2

1. (a) The State of enforcement shall not release the prisoner before the expiry of the sentence as pronounced by the Court.

(b) The [Court] [Presidency] alone shall have the right to decide any application for [commutation of the sentence] [commutation of the sentence or parole] [commutation of the sentence, parole or [pardon]]. [If appropriate in the circumstances, parole may be granted after the prisoner has served:

(i) not less than 20 years in case of life imprisonment;

(ii) not less than two thirds of the term in case of imprisonment for a definite term.

Parole may be revoked when the parolee is convicted of having committed an offence while on parole, or has violated any condition of his parole.]

2. Procedures regarding an application for commutation of sentence [or parole [or pardon]] and the [Court's] [Presidency's] decision on such an application shall be governed by the Rules of Procedure and Evidence.

N.B. Consideration should be given to whether this article should be placed in Part 7.

[Article 101

Escape

In the event of an escape, the sentenced person shall, as soon as he has been arrested pursuant to a request of the Court under article 88, paragraph 1 (d), be delivered to the State in which he was serving his sentence or to another place determined by the Court.]

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. There is hereby established an Assembly of States Parties to this Statute. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. The signatories of the [Statute] [Final Act] may be [observers] [members] in the Assembly.[1]

2. The Assembly shall:

[(a) consider and adopt recommendations of the preparatory commission;]

(b) provide management oversight to the Presidency, Prosecutor and Registrar regarding the administration of the Court;

(c) consider the reports and activities of the Bureau and take appropriate action in regard thereto;

(d) consider and approve the budget for the Court [in consultation with the Registrar] [and rule on any financial issue];

(e) determine whether to alter, as appropriate, the number of judges [or members of the Office of the Prosecutor or the Registry], serving on a full- or part-time basis, for such period as it shall determine;

[(f) consider, upon recommendation [of the Court] [of the Bureau], any question relating to non-cooperation by States Parties [and non-States Parties] and take [necessary] [appropriate] measures, including referring the matter to [the Security Council] [the United Nations General Assembly] as provided in article 86.][2]

(g) perform any other function or take any other action as specified in this Statute or the Rules of Procedure and Evidence [including consideration of requests for a review of these instruments] [including consideration of applications relating to pardon submitted to it.][3]

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[1] Delegations expressed the view that this could be dealt with in the Rules of Procedure of the Assembly.

[2] It will be necessary to ensure consistency between this provision and the content of article 86.

[3] The final wording will depend on the outcome of the discussions on article 100. Mention was also made in this context of a possible role of the Assembly in dispute resolution.

3. (a) The Assembly shall have a Bureau consisting of a President, a Vice-President and [18][4] members elected by the Assembly for three-year terms.[5] The President of the Court, the Prosecutor and the Registrar or their representatives may, as appropriate, participate as [observers] [members] in meetings of the Bureau.[6]

(b) The Bureau shall [have a representative character] [be elected on the basis of ensuring its representative character], taking into account, in particular, equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world [as far as possible].

The Bureau shall meet as often as necessary, but at least once a year, and shall assist the Assembly in the discharge of its responsibilities.

(c) The Assembly may also establish other subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation in order to enhance the efficiency and economy of [non-judicial administration] [operations] of the Court.

4. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations [or in any other place as it may decide] once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in the Statute, special sessions shall be convened [by the Bureau on its own initiative or] at the request of one third of the States Parties.

5. Each State Party shall have one vote. Every effort shall be made to reach decisions on matters of substance by consensus in the Assembly and in the Bureau. If consensus cannot be reached, decisions on matters of substance must be approved by [a two-thirds majority of those present and voting, representing the absolute majority of States Parties] [a two-thirds majority of those present and voting] [an absolute majority of States Parties] except as otherwise provided in the Statute.

6. [A State Party that is in arrears in the payment of its financial contributions to the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding [two full] [three] [five] years. The Assembly may, nevertheless, permit such a State Party to vote in the

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[4] It was suggested that the possibility of having a procedure for increasing the number of members of the Bureau could be considered. It was also suggested that there should be more than one Vice-President.

[5] It was suggested that the elections should be staggered. This could be dealt with in the Rules of Procedure of the Assembly.

[6] Delegations expressed the view that this could be dealt with in the Rules of Procedure of the Assembly.

Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party].[7]

7. The Assembly shall adopt its own Rules of Procedure.

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[7] This is subject to the finalization of the provisions on financing of the Court.

PART 12. FINANCING OF THE COURT

Article 103

Payment of expenses of the Court

Expenses of the Court as assessed by the States Parties shall be paid from the funds of the Court, in accordance with the Statute and the Financial Regulations and Rules adopted by the States Parties.

Article 104

Funds of the Court

Option 1

The funds of the Court shall comprise assessed contributions made by States Parties.

Option 2

The expenses of the Court shall be borne by the United Nations, subject to the approval of the General Assembly of the United Nations.[1]

Option 3

1. The funds of the Court shall include:

   (a) Assessed contributions of States Parties;

   (b) Funds provided by the United Nations.[2]

2. However, during the initial phase,[3] the expenses of the Court shall be borne by the United Nations, subject to the approval of the General Assembly of the United Nations.

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[1] This would require a decision of the General Assembly.

[2] The view was expressed that, in the case of a referral by the Security Council, the relevant expenses of the Court should be borne by the United Nations.

[3] The duration of the "initial phase" has to be determined.

Article 105

Voluntary contributions

Without prejudice to article 104, the Court may utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the States Parties.

Article 106

Assessment of contributions

The contributions of States [Parties] shall be assessed in accordance with an agreed scale of assessment [based upon [the scale used for the regular budget of the United Nations] [a multi-unit class system along the lines of that used in the International Telecommunication Union or the Universal Postal Union]].

Article 107

Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 108

Settlement of disputes

Option 1

[Except as otherwise provided in the Statute] [,a] [A]ny dispute concerning the interpretation or application of this Statute shall be settled by the decision of the Court.

Option 2

Without prejudice to the competence of the Court concerning disputes relating to its judicial activities as is established in accordance with this Statute, any dispute between two or more States Parties relating to interpretation or application of this Statute which is not resolved through negotiations [within a reasonable time] [within ... months] shall be referred to the Assembly of States Parties which shall make recommendations on further means of settlement of the dispute.[1]

Option 3

Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

Option 4

No article on dispute settlement.

Article 109

Reservations

Option 1

No reservations may be made to this Statute.

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[1] The view was expressed that the same procedure may be used for resolving disputes relating to the admissibility of reservations.

It was also observed a cross reference in this article should be made to article 102 (Assembly of States Parties).

Option 2

Paragraphs 1 and 2

Option A

1. No reservations other than those made in accordance with paragraph 2 of the present article shall be permitted.

2. Any State may at the time of signature, ratification, acceptance, approval or accession make reservations in respect of the following ...

Option B

1. No reservations to this Statute shall be permitted unless expressly provided for in specific articles of the Statute.

2. No paragraph 2.

3. A State which has made reservations may at any time by notification in writing to the Secretary-General withdraw all or part of its reservations.

4.

Option A

In the event of a dispute or legal question arising in connection with the admissibility of reservations made by a State under paragraph 2, the Court shall be competent to decide the admissibility of such reservations.

Option B

No paragraph 4.

Option 3

1. At the time of signature, ratification, acceptance, approval or accession, any State may make reservations to articles of this Statute except [those in Parts ...] [articles ...].

2. A State which has made reservations may at any time by notification in writing to the Secretary-General of the United Nations withdraw all or part of its reservation.

Option 4

No article on reservations.

Article 110

Amendments

1. After the expiry of [...] years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to [the Secretary-General of the United Nations,] who shall promptly circulate it to all States Parties.

2. A proposed amendment to this Statute shall be considered at the next [meeting of the Assembly of States Parties] [Review Conference], provided that no consideration shall take place until three months after its circulation pursuant to paragraph 1.

3.

Option 1

The adoption of an amendment at a meeting of the Assembly of States Parties shall be by consensus.

Option 2

The adoption of an amendment at a meeting of the Assembly of States Parties shall require a [2/3] [3/4] majority of [all the States Parties] [those present and voting].

4. [The Secretary-General of the United Nations] shall circulate any amendment adopted at a meeting of the Assembly of States Parties to all States Parties.

5. An amendment adopted at a meeting of the Assembly of States Parties shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by [2/3] [3/4] of [all the States Parties].[2]

6. Any State Party that has not ratified or accepted the amendment may withdraw from the Statute with immediate effect, notwithstanding paragraph 1 of article 115, by giving notice no later than one year after the entry into force of such amendment.

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[2] It was observed that consideration should also be given to requiring a qualified majority for amendments relating to institutional matters and to acceptance by all States Parties for matters of substance.

Article 111[1]

Review of the Statute

Option 1

1. After the expiry of [...] years from the entry into force of this Statute, the meeting of the Assembly of States Parties may decide, by a two-thirds majority of [States Parties] [those present and voting], to convene a special meeting of the Assembly of States Parties to review the Statute. [Such a meeting shall not be held more frequently than [...] years from the previous such meeting.]

2. The provisions of paragraphs 3 to 6 of article 110 shall apply to any amendment to the Statute proposed at such a meeting of the Assembly of States Parties.

Option 2

1. [Five] years after the entry into force of this Statute the Depositary shall convene a meeting of the Assembly of States Parties to review the list of crimes within the jurisdiction of the Court contained in article 5, in order to consider additions to the list. Any amendment to that effect shall be subject to paragraphs 3 and 4 of article 110 and shall enter into force with regard to those States Parties which have deposited their instrument of acceptance on the [thirteenth] day following the deposit of the [tenth] instrument of acceptance. For each State whose instrument of acceptance is deposited after the entry into force of the amendment, the amendment shall enter into force on the [thirtieth] day after the deposit by such State of its instrument of acceptance. If an amendment has not entered into force for a State, the Court shall not exercise its jurisdiction with respect to a crime covered by the amendment when committed on the territory of that State or by its nationals. Subsequently, at the request of a State Party, the Depositary shall, upon approval by a majority of States Parties, convene a meeting of the Assembly of States Parties in order to consider additions to the list of crimes within the jurisdiction of the Court.

2. Without prejudice to paragraph 1, the meeting of the Assembly of State Parties may at any time after the entry into force of this Statute decide, by a two-thirds majority of [Sates Parties] [those present and voting], to convene a special meeting of the Assembly of States Parties to review the Statute. Any amendment to the Statute proposed at such a meeting of the Assembly of States Parties shall be subject to paragraphs 3 to 6 of article 110.

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[1] Some delegations proposed that articles 110 and 111 be merged.

Article 112

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States [without any kind of discrimination] in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on [17 July 1998]. Thereafter, it will remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until [17 October 1998]. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

[Article 113

Early activation of principles and rules of the Statute

Pending the entry into force of the Statute, States that have signed the Statute shall, in accordance with applicable principles of international law, refrain from acts that would defeat the object and purpose of the Statute. To this end, in ensuring the international prosecution and suppression of crimes of international concern, States should pay due regard to the relevant principles and provisions contained in the Statute, including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court.]

Article 114

Entry into force

1. This Statute shall enter into force [following the completion of the Rules of Procedure and Evidence] on the [60th] day following the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations [provided that such instruments have been deposited by no fewer than [one] [two] [four] members from each geographical group as established by the General Assembly of the United Nations].

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the [...] instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the [60th] day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 115

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged by reason of its withdrawal from the financial obligations which accrued while it was a Party to this Statute. Nor shall the withdrawal affect the duty of that State to cooperate with the Court in connection with criminal investigations and proceedings commenced under this Statute prior to its termination for that State; nor shall it prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal becomes effective.

[A State shall not be discharged by reason of its withdrawal from the obligations arising from the Statute while it was a Party to this Statute. Nor shall the withdrawal prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal becomes effective.]

Article 116

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

PART TWO

DRAFT FINAL ACT OF THE UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

1. The General Assembly, in its resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an international criminal court.

2. The General Assembly, in its resolution 52/160 of 15 December 1997, accepted with deep appreciation the generous offer of the Government of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998.

3. Previously, the General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, requested the Commission to elaborate the draft statute for such a court as a matter of priority.

4. The International Law Commission considered the question of establishing an international criminal court from its forty-second session, in 1990, to its forty-sixth session, in 1994. At that session, the Commission completed a draft statute for an international criminal court, which was submitted to the General Assembly.

5. The General Assembly, in its resolution 49/53 of 9 December 1994, decided to establish an ad hoc committee to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.

6. The Ad Hoc Committee on the Establishment of an International Criminal Court met from 3 to 13 April and from 14 to 25 August 1995, during which time the Committee reviewed the issues arising out of the draft statute prepared by the International Law Commission and considered arrangements for the convening of an international conference.

7. The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts with a view to preparing a widely

acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

8. The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.

9. By its resolution 51/207 of 17 December 1996, the General Assembly decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference.

10. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court.

11. In its resolution 52/160 of 15 December 1997, the General Assembly requested the Preparatory Committee to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

12. The Preparatory Committee met from 16 March to 3 April 1998, during which time the Committee completed the preparation of the draft Convention on the Establishment of an International Criminal Court, which was transmitted to the Conference.

13. The Conference met at the headquarters of the Food and Agriculture Organization of the United Nations in Rome from 15 June to 17 July 1998.

14. The General Assembly, in its resolution 52/160, requested the Secretary-General to invite all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency to participate in the Conference. The delegations of ... States participated in the Conference, as follows: ...

15. In the same resolution, the General Assembly requested the Secretary-General to invite representatives of organizations and other entities that had received a standing invitation from the Assembly pursuant to its relevant resolutions to participate as observers in its sessions and work on the understanding that such representatives would participate in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental organizations and other interested international bodies, including the International Tribunals for the Former Yugoslavia and for Rwanda. The following organizations were represented at the Conference by an observer: ...

16. Pursuant to the same resolution, the Secretary-General invited non-governmental organizations accredited by the Preparatory Committee with due regard to the provisions of section VII of Economic and Social Council

resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee and in accordance with the resolution as well as the rules of procedure to be adopted by the Conference. The following non-governmental organizations were represented at the Conference by an observer: ...

17. The Conference elected ... as President.

18. The Conference elected as Vice-Presidents the representatives of the following States: ...

19. The following committees were set up by the Conference:

General Committee

Chairman: ...

Members: ...

Committee of the Whole

Chairman: ...

Vice-Chairmen: ...

Rapporteur: ...

Drafting Committee

Chairman: ...

Members: ...

The Rapporteur of the Committee of the Whole participated ex officio in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference.

Credentials Committee

Chairman: ...

Members: The representatives of ...

20. The Secretary-General was represented by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Executive Secretary. The Secretariat was further composed as follows: ...

21. The Conference had before it a draft Convention on the Establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate ...

22. The Conference assigned to the Committee of the Whole the consideration of the draft Convention on the Establishment of an International Criminal Court adopted by the Preparatory Committee. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

23. On the basis of the deliberations recorded in the records of the Conference (A/CONF. ...) and of the Committee of the Whole (A/CONF. ...) and the reports of the Committee of the Whole and the Drafting Committee (A/CONF. ...), the Conference drew up the following [Convention]:

[Rome Convention on the Establishment of an International Criminal Court]

24. The foregoing Convention, which is subject to ratification, was adopted by the Conference on ... July 1998 and opened for signature on [17 July 1998], in accordance with its provisions, until [17 October 1998] at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

25. After 17 October 1998, the closing date for signature at the Ministry of Foreign Affairs of Italy, the Convention will be deposited with the Secretary-General of the United Nations.

26. The Conference also adopted the following resolutions, which are annexed to the present Final Act:

Tribute to the International Law Commission

Tribute to the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee

Tribute to the People and the Government of Italy

[Resolution on the Establishment of the Preparatory Commission for the International Criminal Court]

...

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Rome this seventeenth day of July, one thousand nine hundred and ninety-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Ministry of Foreign Affairs of Italy.

ANNEX

Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

...

The United Nations Conference on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

Having decided that a preparatory commission should be established for the fulfilment of these purposes,

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission [as early as possible at a date to be decided by [the General Assembly of the United Nations] [the Secretary-General]] [upon signature of or accession to the Statute by ... States].[1]

2. The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference.

3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These elections shall take place at the first meeting of the Commission.

4. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

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[1] With regard to these alternatives, a proposal was also made that the Rules of Procedure and Evidence of the Court, including an elaboration of the elements of the offences that must be proved, shall be prepared and adopted by a conference of participating States immediately following the conclusion of the present Statute. Such rules shall be consistent with the provisions of the Statute. The Statute shall be open for signature once the Rules of Procedure and Evidence have been finally adopted.

(a) Rules of Procedure and Evidence [including elements of offences][2] on a priority basis;

(b) a relationship agreement between the Court and the United Nations;

(c) basic principles governing a headquarters agreement to be negotiated between the Court and the host country;

[(d) staff regulations;][3]

(e) financial regulations and rules;

[(f) an agreement on the privileges and immunities of the Court;]

(g) a budget for the first financial year;

(h) the rules of procedure of the Assembly of States Parties.

5. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties. [It shall convene the first meeting of the Assembly of States Parties.]

6. The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties.

7. The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat services as it may require, subject to the approval of the General Assembly of the United Nations.

8. The Secretary-General of the United Nations shall bring this resolution to the attention of the General Assembly for any necessary action.

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[2] The view was expressed that the Preparatory Commission may decide to make use of the expertise and experience of the International Tribunals for the Former Yugoslavia and for Rwanda, particularly in drafting the Rules of Procedure and Evidence. To this end, representatives of the Tribunals may be invited to participate as observers in the work of the Commission.

[3] This subparagraph should be in conformity with article 45 of the Statute.